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In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY and DR. RICHARD BENJAMIN, in his official capacity,

Petitioners,

vs.

MICHAEL DOE, by and through his parents and next friends, DR. AND MRS. DOE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision by the United States Court of Appeals for the Sixth Circuit which held that the Individuals with Disabilities Education Act grants the parents of disabled children the right to collaterally attack the adequacy of a local education agency's child find plan, which has been approved by the State educational agency as a condition for receiving federal funds, is inconsistent with the United States Supreme Court's Spending Clause decisions.

2. Whetner the Individuals with Disabilities Education Act grants jurisdiction to due process hearing officers and the state or federal reviewing courts to determine whether a local educational agency's child find plan is adequate.

3. Whether there are any disputed issues of material fact that the Metropolitan Nashville Public Schools met its duty pursuant to the Individuals with Disabilities Education Act to identify disabled children in private schools that were in need of special education and related services, which would preclude summary judgment.

LIST OF PARTIES

The parties are Michael Doe, by and through his parents and next friends, Dr. and Mrs. Doe, Plaintiffs-Respondents, and the Metropolitan Government of Nashville and Davidson County and Dr. Richard Benjamin in his official capacity as Director of Schools, Defendants-Petitioners.

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THE OPINIONS BELOW

Petitioner seeks a writ of certiorari for review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this cause. The opinion is reported. *Doe by and through Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384 (6th Cir. 1998). The opinion was filed January 5, 1998. The opinion is set forth at pages 1a through 10a of the appendix to this petition. The United States District Court entered its memorandum and order in this matter on July 1, 1996. The memorandum and order are set forth at pages 11a through 19a of the appendix. The Administrative Law Judge entered the final order in this matter on September 26, 1995. The final order is set forth at pages 20a through 29a of the appendix.

JURISDICTION

The Appellate Court judgment was filed January 5, 1998. A petition for rehearing and reconsideration was timely filed on January 19, 1998. The Appellate Court entered its denial of the petition for rehearing and reconsideration on February 17, 1998. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The state eligibility requirements of the Individuals with Disabilities Education Act, codified at 20 U.S.C. § 1412, and set forth at pages 30a through 31a of the

appendix, mandate that a State educational agency wishing to qualify for assistance under this subchapter demonstrate to the Secretary of Education that the State has developed a plan that sets forth in detail the policies and procedures which the State will undertake or has undertaken to assure that:

> (2)(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services and which are not currently receiving needed special education and related services.
>
> (7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

The application requirements for a local educational agency under the Individuals with Disabilities Education Act, codified at 20 U.S.C. § 1414(a)(1)(A), and set forth at pages 31a through 32a of the appendix, are also involved and require, in pertinent part, that the local educational

agency submit a plan to the State educational agency for its approval that:

> (A) provide[s] that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services.

The procedural safeguards provisions of the Individuals with Disabilities Education Act, codified at 20 U.S.C. § 1415, and set forth at pages 32a through 34a of the appendix, are also involved and provide that the State educational agency shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that all children with disabilities and their parents are guaranteed procedural safeguards that shall include, but not be limited to:

> (b)(1)(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
>
> (b)(1)(C) written prior notice to the parents or guardian of the child whenever such agency or unit –

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(b)(1)(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(b)(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. . . .

(e)(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

In addition to the aforementioned provisions of the Individuals with Disabilities Education Act, the federal regulations codified at 34 C.F.R. § 300.128 and 34 C.F.R. § 300.220 which implement the child find provisions, are

also involved and are set forth in the appendix at pages 34a through 36a.

STATEMENT OF THE CASE

Proceedings Below

Plaintiffs-Respondents Dr. and Mrs. Doe requested a due process hearing, as provided for in the Individuals with Disabilities Education Act ("IDEA"), to determine whether the Defendants-Petitioners Metropolitan Government of Nashville and Davidson County, et al., were obligated to reimburse them for educational costs incurred as a result of their unilateral placement of Plaintiff-Respondent Michael Doe in a private residential school. The Administrative Law Judge ("ALJ") presiding over the due process hearing ruled in favor of the Metropolitan Government of Nashville and Davidson County. On November 27, 1995, Plaintiffs-Respondents filed a complaint to appeal this decision of the ALJ. Defendants-Petitioners filed their answer on January 30, 1996, and subsequently filed a motion for summary judgment on March 29, 1996.

The District Court granted Defendants-Petitioners' motion for summary judgment on July 1, 1996. Plaintiffs-Respondents timely filed a notice of appeal to the Sixth Circuit Court of Appeals on July 30, 1996. The Sixth Circuit reversed the District Court's grant of summary judgment and remanded the case to the District Court in an opinion filed January 5, 1998. The Sixth Circuit held that school systems have an affirmative obligation arising from the child find duty to provide all parents within

their jurisdiction with information concerning the specific procedural and substantive rights afforded to children with disabilities. Further, the Sixth Circuit held that a failure to provide this information could give rise to a violation of the IDEA for which reimbursement could be awarded. Finally, the Sixth Circuit held that disputed issues of material fact precluded summary judgment in this matter. Prior to filing this petition for certiorari, Defendants-Petitioners filed a motion to stay the mandate, which was denied on March 12, 1998.

Certiorari is sought to determine whether the IDEA grants jurisdiction to due process hearing officers and the reviewing courts to determine whether a local educational agency's child find plan is adequate under the IDEA and whether the Sixth Circuit's decision conflicts with Spending Clause decisions of the Supreme Court. If this Court determines that the courts have jurisdiction and that the Sixth Circuit's decision does not conflict with this Court's Spending Clause precedent, then certiorari is also sought to determine whether the Defendants-Petitioners are nevertheless entitled to summary judgment on the grounds that they met their child find duty.

The Relevant Facts

The Metropolitan Government of Nashville and Davidson County, acting through the Metropolitan Public Schools ("Metro") and its Director of Schools, Dr. Richard Benjamin, is a local educational agency receiving grant funds through the IDEA. Plaintiff-Respondent Michael Doe is a child with a disability as defined by the IDEA. Michael's parents, Dr. and Mrs. Doe, have resided in

Metropolitan Nashville Davidson County at all times relevant to this action. Prior to the initiation of this action, Michael Doe never attended public school. Dr. and Mrs. Doe enrolled Michael in private school from the time he attained the age of compulsory school attendance until he was fourteen years old. Dr. and Mrs. Doe were well aware that Michael had serious behavioral and emotional problems prior to his enrollment in Benton Hall School, a private special education school in Tennessee. Prior to the initiation of this action, Dr. and Mrs. Doe never contacted Metro for any reason related to Michael's education. Michael was dismissed from Benton Hall in May, 1992, after he assaulted a teacher. At the time Michael was dismissed from Benton Hall, Dr. Doe discussed possible placements for Michael with the principal of Benton Hall. Because Dr. Doe is a psychiatrist, with training in child psychiatry and with an active local psychiatric practice including child and adolescent patients, the principal of Benton Hall believed that Dr. Doe was better able than he to determine an appropriate placement for Michael. At all times relevant to this action, Dr. and Mrs. Doe knew that Metro offered programs and services to children in need of special education.

After being dismissed from Benton Hall, Michael was unilaterally enrolled by his parents at the Grove School in Connecticut, a residential school for emotionally-disturbed children. Metro was not involved in any capacity with the decision to place Michael in Grove School. Two years after Michael began attending Grove School, Dr. and Mrs. Doe sought reimbursement of tuition and travel expenses incurred in placing Michael at the school in the amount of $87,155. Metro refused to reimburse Dr. and

Mrs. Doe for expenses incurred in their unilateral placement of Michael because Metro had no prior knowledge that Michael was a disabled student, never had an opportunity to evaluate Michael, and never had an opportunity to offer Michael a free appropriate public education. Once the Does contacted Metro concerning reimbursement of Michael's tuition at Grove School, Metro did evaluate Michael and offered him an appropriate placement within the public school system. The appropriateness of that placement has not been challenged.

Metro's child find plan for carrying out its duty to identify and locate disabled children in need of special education and related services was approved by the Tennessee Department of Education in the summer of 1991, after a public hearing. Metro conducted its child find activities in accordance with the terms of the plan. Metro's child find activities included radio, television and newspaper advertisements, distribution of brochures in public places, letters to parents and information to all physicians and hospitals in the area, appearances before civic groups, parent-teacher associations and other parent groups, and communications with private schools concerning available services.

ARGUMENT

I

In 1975, Congress provided that it would make funds available to the states to fund special education programs so long as the states agreed to implement policies assuring a "free appropriate public education" for all disabled

children residing within their jurisdiction. 20 U.S.C. § 1412(1). Congress passed the law known today as the Individuals with Disabilities Education Act ("IDEA") "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs[.]" *Id.* § 1400(c). The IDEA functions as both a funding statute and as a regulatory statute. It grants aggrieved individuals a private right of action under certain circumstances, while imposing extensive application requirements upon states receiving federal funds. *Honig v. Doe,* 484 U.S. 305, 310, 108 S.Ct. 592, 597, 98 L.Ed.2d 686 (1988).

The IDEA provides federal block grants to states, which the states then allocate to local educational agencies to assist the local agencies in financing the education of disabled students. States electing to participate in this system of grants must establish and have "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). States desiring to receive IDEA funds must further ensure that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated." 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A); 34 C.F.R. §§ 300.128(a)(1) & note 1, 300.220 & note, 300.300 note 3. This obligation is known as the "child find" duty.

The IDEA authorizes federal review of state and local agencies to ensure compliance with the requirements of the IDEA, 34 C.F.R. §§ 104.61, 100.7, and creates specific

procedural safeguards for the parents of disabled children. The bulk of the IDEA, however, addresses the application requirements which states must meet in order to qualify for grant assistance from the federal government. While not just a funding statute, the IDEA was enacted pursuant to Congress' spending powers. *Board of Education of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 204 n.26, 102 S.Ct. 3034, 3049 n.26, 73 L.Ed.2d 690 (1982)(citing *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981)); *Honig v. Doe*, 484 U.S. 305, 310, 108 S.Ct. 592, 597, 98 L.Ed.2d 686 (1988).

Congress' spending power is derived from Art. 1, § 8 of the U.S. Constitution, which provides:

> [1] The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . .

When Congress enacts legislation pursuant to the Spending Clause of Article I, it, in effect, offers to form a contract with potential recipients of federal funding. *Pennhurst*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694. The legislative purpose of congressional enactments under the Spending Clause is "to further [Congress'] broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.). Congress uses its spending power "to induce governments and private parties to cooperate voluntarily with federal policy." *Id.*

This Court has held that in order for a congressional expenditure under the Spending Clause to be valid, Congress must condition the receipt of grant funds upon unmistakably clear terms. *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987) (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981)). "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540. A State cannot be held to have a knowing acceptance of the terms if a State is unaware of the conditions or is unable to ascertain what is expected of it. *Id.* This Court relied on *Pennhurst* in analyzing Section 1412(1) of the IDEA, holding that it is a "fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously." *Board of Educ. v. Rowley*, 458 U.S. at 190 n.11, 102 S.Ct. at 3042 n.11 (citing *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540).

At the due process hearing, the ALJ found that Metro had failed to fulfill its child find duty pursuant to the IDEA. ALJ Final Order pp. 7-8. The United States District Court for the Middle District of Tennessee did not address the issue other than to acknowledge that the ALJ had so found. *Doe By and Through Doe v. Metropolitan Nashville Public Schools*, 931 F.Supp. 551, 554 (M.D. Tenn. 1996). The United States Court of Appeals for the Sixth Circuit held that "In cases where the lack of dialogue (with the school system) stems from the school district's failure to conduct sufficient 'child find', reimbursement

may be appropriate." *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 388 (6th Cir. 1998). The Sixth Circuit and ALJ decisions holding Metro's child find inadequate results in ambiguity in the terms of the grant. The state and federal administrative agencies that monitor compliance with the requirements of the grant program found Metro's child find plan to be adequate. The two positions are mutually exclusive, and leave Metro in the untenable position of being unsure as to whether Metro is in compliance with the terms of the IDEA grant program. If the terms of the grant program are unclear, the conditions become invalid. *Board of Educ. v. Rowley*, 458 U.S. at 190 n.11, 102 S.Ct. at 3042 n.11 (citing *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540). The ALJ and Sixth Circuit decisions create uncertainty as to the terms of the IDEA's grant program.

II

Child find plans are approved by the state and federal agencies who are delegated the task of approving grant applications. 20 U.S.C. §§ 1413(a)(1) and 1414(a)(1)(A). Neither the due process hearing officer nor the reviewing courts have jurisdiction to determine the adequacy of a local educational agency's child find plan. Jurisdictional questions may be raised at any time, by the parties or upon this Court's own motion. *Louisville & Nashville N.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42-43, 53 L.Ed. 126 (1908).

The IDEA does grant disabled children and their parents a private right of action to "assure that children

with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of [a] free appropriate public education . . . " 20 U.S.C. § 1415(a). Pursuant to 20 U.S.C. § 1415(b)(1)(E), the Does have the right to complain that Metro did not conduct child find in accordance with the terms of the approved plan. In the instant case, however, the Does' complaint is not with Metro's implementation of the child find plan, but with the plan itself. The Does concede that Metro carried out its child find plan.

The legislative purpose behind the IDEA was to induce states to comply with the objectives of Congress in exchange for the receipt of grant funds. *Commonwealth of Virginia Department of Education v. Riley*, 106 F.3d 559, 573 (4th Cir. 1997) (citing *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)); 20 U.S.C. § 1400(c). To that end, Congress requires the submission of state plans to the U.S. Department of Education for approval in order to qualify for federal grant funds. 20 U.S.C. § 1413. Among the required elements of the state plan is the mandate that the plan include the state's policy for child find. 20 U.S.C. § 1413(a)(1). The child find provision of the grant program reads:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:
>
> The State has developed a plan pursuant to section 1413(b) of this title . . . Each such

> amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that –
>
> all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

20 U.S.C. § 1412(2)(C). The plain language of this provision contemplates a grant program condition. This child find provision, on which the Does rely as the basis for their action, does not grant to the Does a private right of action, and is instead a provision of the grant program which sets forth one of the conditions which the state must meet to qualify for assistance from the federal government.

The IDEA sets forth public notice and hearing requirements which require that the general public be given notice and an opportunity to object to the contents of a state's plan. 20 U.S.C. § 1412(7)(B). The relevant portion states

> The State shall assure that . . . (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs and procedures required pursuant to the provisions of this section and section 1413 of this title.

Id. § 1412(7)(B). This provision applies to all aspects of the state plan, including the child find policies implemented in accordance with the requirements of the IDEA. The means provided by the IDEA for public input on child find plans is the appropriate forum for the Does' claim not a collateral attack in a due process hearing.

If the IDEA is interpreted as permitting a collateral attack on the contents of a duly-approved child find plan, Metro is faced with the dilemma of trying to reconcile incompatible decisions. The Tennessee Department of Education's Division of Special Education approved Metro's child find plan. The due process hearing officer held that Metro's child find plan was inadequate. The IDEA does not grant due process hearing officers jurisdiction to conduct judicial review of a state's administrative agency's decisions. Judicial review of an administrative agency's decisions should be through the state administrative procedures review provisions. Neither due process hearing officers or the courts that review their decisions have jurisdiction to hold that a local educational agency's child find plan is inadequate.

III

Where there are no genuine issues of material fact in dispute, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Further, summary judgment should be utilized as a tool to isolate and dispose of claims or defenses that are either factually unsupported or based on undisputed facts. *Celotex*, 477 U.S. at 323-324, 106 S.Ct. at 2552-2553. Rule 56(c) of the Federal Rules of Civil

Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court has held that the summary judgment standard provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202 (1986).

The inquiry to determine whether there is a genuine issue of material fact is two-fold. *Id.* at 252. First, the materiality of a fact is determined from the substantive law governing the claim. An issue is material only if the disputed fact might affect the outcome of the suit under substantive law. *Id.* Second, an issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* It is the non-moving party's burden to demonstrate that there is evidence to support each essential element of his or her claim to survive a motion for summary judgment. *Id.* In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) (relying on Fed.R.Civ.P. 56(e)), this Court found that a party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 391 U.S., at 288-289, 88 S.Ct., at 1592.

The Sixth Circuit's decision significantly expands a school district's child find obligations in a manner inconsistent with the statutory language of the IDEA and all prior decisions by the administrative agencies charged with enforcing child find. It blurs the distinction between a local educational agency's duty to identify handicapped children who are in need of special education and related services and an educational agency's duty, once a handicapped child is identified, to inform the child's parents of their procedural and substantive rights under the statute. Specifically, the Sixth Circuit held that the child find provisions of the IDEA require school systems to inform all parents within their jurisdiction of all specific procedural and substantive rights of children with disabilities. Further, the Sixth Circuit held that a failure to apprise parents of specific procedural and substantive rights arising from the child find duty could make reimbursement a proper remedy. *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 388 (6th Cir. 1998).

The regulations that implement the IDEA state, in pertinent part:

> Each state plan must include in detail the policies and procedures that the State will undertake, or has undertaken, to ensure that –
>
> (1) All children with disabilities . . . are identified, located and evaluated; and
>
> (2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not . . .

34 C.F.R. § 300.128. Beyond requiring the establishment of "practical methods" to locate children in need of these services, the IDEA is silent as to what constitutes adequate child find. One district court has held that visiting private schools, mailing brochures, appearing at meetings, and contacting local pediatricians satisfied a school district's obligation to conduct child find activities. *David H. v. Spring Branch Indep. School Dist.*, 569 F.Supp. 1324, 1339 (S.D.Tex. 1983). More recently, the United States Department of Education Office for Civil Rights opined that the IDEA "does not specify the manner in which a district must meet its location and notification responsibility," and listed notices to private schools, state and local agencies, and notices placed in newspapers as means by which school districts could undertake to fulfill their child find obligations. *Letter to Veir*, 20 IDELR 864 (OCR 1993).

At the administrative level, there have been a number of cases that have provided examples of acceptable and practical child find measures. In *Pueblo Sch. Dist. # 70*, 20 IDELR 276 (OCR 1993), posting notices at schools, libraries, hospitals, post offices, health clinics and retail establishments, as well as public service announcements and annual screenings of children under five years of age was held to be adequate child find activities. Other measures taken by schools which have been held adequate include newsletters sent to parents of public school children, screening of public school entrants, newspaper articles, seeking referrals from welfare agencies, following up students with poor academic performance, and radio announcements. *See Cohocton Cent. Sch. Dist.*, 17 IDELR 484 (OCR 1990), *De Soto County*

Sch. Dist., 17 IDELR 843 (OCR 1991). These methods were found to be both practical and adequate by the Office of Civil Rights.

It is undisputed that Metro established a plan to conduct child find activities and that the State of Tennessee approved the plan. *Child Identification Policy 1989-1990, Metropolitan Nashville Public Schools.* Metro's activities in conducting child find include radio, television and newspaper advertisements, distribution of brochures in public places, letters to parents and information to all physicians and hospitals in the area, appearances before civic groups, parent-teacher associations and other parent groups, and communications with private schools concerning available services. *Id.* Despite these undisputed facts and the Does' knowledge that special education was available to Michael through Metro, the Sixth Circuit ruled that the Does could be entitled to reimbursement due to Metro's inadequate child find measures.

The IDEA mandates only that states develop a plan to identify, locate and evaluate children in need of special education and related services, and that a "practical method" be implemented to determine which children are receiving needed services and which are not. 20 U.S.C. § 1412(2)(C), 34 C.F.R. § 300.128. To hold that Metro must provide all parents within its jurisdiction with information concerning the specific procedural and substantive rights of children with disabilities, prior to any contact between the school system and the parents, expands the local educational agency's duties beyond those set out in the statute. The stated purpose of the

IDEA is to provide a free appropriate public education to disabled children. The purpose of the child find requirement is to disseminate the knowledge to the general public that a free appropriate public education is available in the public school system to disabled children. The Does' admission that they knew they could access special education for their child through the Metro school system not only precludes them from receiving tuition reimbursement, it confirms that the school system was successful in achieving the goal of its child find activities. The issue as to whether the Does had specific knowledge concerning their potential right to residential placement, although disputed, is immaterial because it is not an issue that could affect the outcome of the litigation, and, therefore, cannot preclude a grant of summary judgment.

The petition for certiorari should be granted because the IDEA does not grant due process hearing officers, or the courts that review their decisions, jurisdiction to collaterally attack the decisions of the administrative agencies charged with administering this federally funded grant program. Allowing such attacks conflicts with the Supreme Court's Spending Clause precedent that holds that the terms of a grant program must be unambiguous. The Metropolitan Government would further urge that, as a matter of law, the Metropolitan Government met its duty to identify children with disabilities that were in need of special education and related services.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES L. MURPHY, III*
JAMES L. CHARLES
METROPOLITAN DEPARTMENT OF LAW
Attorney for Petitioners

204 Metropolitan Courthouse
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**Counsel of Record*

Michael DOE, by and through his parents and next friends, Mr. and Mrs. Bill DOE, Plaintiff-Appellant,

v.

METROPOLITAN NASHVILLE PUBLIC SCHOOLS; Dr. Richard Benjamin, in his Official capacity, Defendants-Appellees.

No. 96-6103.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 23, 1997.

Decided Jan. 5, 1998.

Jack W. Derryberry, Jr. (argued and briefed), Ward, Derryberry & Thompson, Nashville, TN, for Plaintiff-Appellant.

Rachel D. Allen (argued), Metropolitan Department of Law, Nashville, TN, John D. Kitch (briefed), Kitch & Garman, Nashville, TN, Judith Jo Shell (briefed), Metropolitan Department of Law, Nashville, TN, for Defendants-Appellees.

Before: KEITH, BOGGS, and NORRIS, Circuit Judges.

OPINION

BOGGS, Circuit Judge.

Michael Doe, through his parents, sued the Metropolitan Nashville Public Schools (Metro) under the Individuals with Disabilities Education Act (IDEA), seeking

review of an adverse decision by a Tennessee Administrative Law Judge. The ALJ had denied Doe (or, more precisely, his parents) reimbursement for expenses associated with his special education at a private school.

The district court granted the defendants' motion for summary judgment, holding that Doe's parents had decided unilaterally to place him at the private school. The district court determined that, because Metro had not been given the opportunity to evaluate Doe and construct an individualized educational plan, it was not obligated to reimburse the Does. The district court awarded summary judgment despite the existence of several disputed issues of material fact. We reverse the district court and remand this case for further proceedings.

I

Michael Doe, a resident of Nashville, is learning disabled and has been diagnosed as emotionally disturbed. In 1992, when he was 12 years old, Michael was dismissed from Benton Hall, a private, special-education school in Nashville, for "assaultive" and "aggressive" behavior. At that point, Michael had only attended private schools, all in the Nashville area. After his dismissal from Benton Hall, however, his parents decided to place him in the Grove School, a private school in Connecticut. They made this decision without Metro's knowledge or input.

In October 1993, after Michael had been at Grove for a year, his parents requested a multi-disciplinary team

(M-Team) meeting with Metro,[1] in order to consider Michael's educational needs. They also sought reimbursement for the expenses associated with sending Michael to Grove. After the third M-Team meeting, in April 1994, Metro certified Michael's eligibility for its special-education services and placed him in a local school. Metro refused, however, to reimburse the Does for Michael's education at Grove, since the decision to place him there had been made without their knowledge or input. After the six-month pendency of the M-Team review, during which Michael continued to attend Grove, the Does' expenses totalled $87,155.

Michael's parents requested a due-process hearing before a Tennessee state administrative law judge. They once again sought reimbursement for the cost of sending Michael to Grove, and they argued that Metro had failed to live up to the "child-find" requirements of IDEA, under which school districts must locate and evaluate disabled children within their jurisdictions.

The ALJ found that the school's child-find efforts were inadequate. Nonetheless, she determined that Metro's failure was outweighed in Michael's case by the Does' actual knowledge of available services. The ALJ concluded that Doe's placement at Grove was unilateral, that the unilateral character of the decision was a result of the Does' knowing failure to act rather than of Metro's laxity, and that reimbursement was thus inappropriate.

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[1] "M-Team" is a term under the IDEA for a group of experts and interested parties brought together to decide the appropriate educational course for a child.

Pursuant to 20 U.S.C. § 1415(e), the Does brought a civil action to challenge the ALJ's decision, in the United States District Court for the Middle District of Tennessee. Metro moved for summary judgment. In response, Doe argued that summary judgment was inappropriate because the ALJ's findings were not undisputed, and because both parties intended to move for additional development of the record if the court denied summary judgment. The district court granted the motion, simply affirming the ALJ's findings, without specifically holding that there were no disputed issues of material facts. Doe then filed this timely appeal.

II

A

Under IDEA, the district court uses a "modified de novo" standard for reviewing state administrative determinations. *Doe v. Board of Educ.*, 9 F.3d 455, 458 (6th Cir.1993) (applying *Board of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 3050-51, 73 L.Ed.2d 690 (1982)), *cert. denied*, 511 U.S. 1108, 114 S.Ct. 2104, 128 L.Ed.2d 665 (1994). This means that the district court should perform a de novo review, but it "should give due weight to the state administrative proceedings in reaching its decision." *Doe*, 9 F.3d at 458 (quoting *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983)). The Supreme Court warned courts against substituting "their own notions of sound educational policy for those of the school authorities which they review," and derived the due weight requirement from "[t]he fact that § 1415(e)

requires that the reviewing court 'receive the records of the [state] administrative proceedings. . . . ' " *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051 (quoting 20 U.S.C. § 1415(e)).

Unfortunately, neither Rowley nor any of our cases interpreting it tells us explicitly what weight is "due." *Cf. Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) ("Once it is determined that due process applies, the question remains what process is due."). Other circuits have interpreted the standard in various ways. *See, e.g., Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir.1997) (weight due is less than that under the "substantial evidence" test, but court should consider the state hearing panel's expertise and opportunity to observe demeanor evidence); *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir.1997) ("Administrative findings in an IDEA case 'are entitled to be considered prima facie correct,' and 'the district court, if it is not going to follow them, is required to explain why it does not.' "); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989-90 (1st Cir.1990) ("Hence, the court must render . . . a 'bounded, independent decision [ ] – bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court.' "), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991).

Each of these interpretations of the due weight standard is sensible, and they are not mutually exclusive. For present purposes, though, we need not resolve the meaning of "due weight" definitively. We hold only that "due weight" does not mean that the district court can simply

adopt the state administrative findings without an independent re-examination of the evidence. Unless the re-examination revealed that no material facts were in dispute, the district court would then have to weigh the evidence, which is never appropriate at the summary judgment stage. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986).

Although the ALJ had reached her own conclusions, the parties wanted to exercise their right in district court to re-contest the facts and to present additional evidence. *See* 20 U.S.C. § 1415(e)(2). As such, if genuine issues of material fact remained, summary judgment was inappropriate.[2] *See Anderson*, 477 U.S. at 247-48, 106 S.Ct. at

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[2] If neither party had expressed a desire to put on evidence beyond that in the administrative record, as allowed by 20 U.S.C. § 1415(e)(2), the district court could have decided this case at the same stage in the proceedings, but such a decision would not have been summary judgment. Summary judgment requires that there be no disputed issues of material fact; that the facts be viewed in the light most favorable to the non-movant; and that the movant be entitled to a judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2509-10.

Therefore, we disagree with the Ninth Circuit, which has said that when no party has requested the hearing of additional evidence, a motion for summary judgment is an appropriate way to bring about a regular appeal, with a regular preponderance standard. *See Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 892 (9th Cir.1995) ("Though the parties may call the procedure a 'motion for summary judgment' in order to obtain a calendar date from the district court's case management clerk, the procedure is in substance an appeal from an administrative determination."); *see also Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir.1993) (treating summary judgment motion as bench trial based on stipulated

2509-10 (1986); *Tennessee Dep't of Mental Health v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir.1996) (using the traditional summary-judgment standard in an IDEA context). The district court failed to apply the proper summary judgment standard, and even if it had done so, it would have been required to reject summary judgment.

B

Metro argues that even if the district court had used the proper standard, it was still entitled to summary judgment because of the Does' admitted knowledge of the general availability of services. The decisive facts, Metro asserts, are that the Does knew they could obtain services from Metro; that they chose not to; that their placement of Michael at Grove was thus unilateral; and that reimbursement is therefore inappropriate per se.

It is well settled that parents whose children are already in the public system (that is, they have been evaluated by local officials and are receiving a publicly-funded education, whether in a public or private school) act at their own risk when they unilaterally move a child

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record). The *Capistrano* court wondered "what else the district court could do as a practical matter" *Id.* It is true that a district court in that situation would have nothing to do other than to decide the case based on the record. The distinction between a review of the ALJ's decision on a closed record and summary judgment is substantive – a very different standard is applied – rather than merely procedural. There is no good reason, however, to confuse matters by allowing this to be called summary judgment.

to a different school. Only where the court later determines that the original placement was improper under IDEA can the parents be reimbursed for the subsequent, unilateral placement. *See Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15, 114 S.Ct. 361, 366, 126 L.Ed.2d 284 (1993); *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153, 156 (6th Cir.1989).

There is a distinction, though, between parents who act unilaterally after consultation with the school system, and those who act unilaterally without any dialogue with the school. *See Town of Burlington v. Department of Educ.*, 736 F.2d 773, 799 (1st Cir.1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). In cases where the lack of dialogue stems from the school district's failure to conduct sufficient "child- find," reimbursement may be appropriate.

Put another way, reimbursement after a unilateral placement can be appropriate, upon a finding of sufficiently serious procedural failures by the school district. *See Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 589 (9th Cir.1992); *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 634-35 (4th Cir.1985). Even though the Does had some general knowledge of the availability of services, the failure by Metro to apprise the Does of their specific procedural and substantive rights could make reimbursement a proper remedy.

Therefore, we reject Metro's claims that the Does' general knowledge meant as a matter of law that they were not entitled to reimbursement. Mere general knowledge is not sufficient to foreclose this inquiry, particularly when there is evidence of procedural failures by the

school district. The extent of the Does' knowledge needs to be determined, as well as the degree of Metro's laxity. Then, these two factors needed to be weighed against each other, with due weight given to the ALJ's determinations. The ALJ weighed the factors, of course, but the district court should have performed its own analysis, based on all available evidence, rather than merely adopting on summary judgment the ALJ's evaluation of the administrative record. This will be the district court's task on remand.

C

The district court also should have given separate consideration to reimbursement for the six-month "pendency" period between the Does' first official contact with Metro in October 1993, requesting the M-Team meeting, and the decision to bring Doe into the Metro system in April 1994. It is possible that, even if they were not entitled to pre-pendency reimbursement, the Does were entitled to pendency reimbursement. The ALJ recognized this possibility, but found that pendency reimbursement was not appropriate because the length of the M-Team proceedings was reasonable. The district court should have reviewed this determination, which was also clearly disputed and not appropriate for summary judgment.

III

We find, therefore, that the district court's grant of summary judgment was inappropriate in this case. Accordingly, we REVERSE the district court and

REMAND for further proceedings consistent with our opinion.

931 F.Supp. 551

111 Ed. Law Rep. 788

Michael DOE, By and Through his parents and next friends, Mr. and Mrs. Bill DOE, Mr. Bill Doe, Mrs. Bill Doe

v.

METROPOLITAN NASHVILLE PUBLIC SCHOOLS, a body corporate and politic, Dr. Richard Benjamin, Director of Schools, in his official capacity.

No. 3-95-1140.
United States District Court,
M.D. Tennessee,
Nashville Division.

July 1, 1996.

Jack Westmore Derryberry, Jr., Nashville, Tennessee, for plaintiff.

Judith Jo Shell, Nashville, Tennessee, John D. Kitch, Nashville, Tennessee, for defendant.

MEMORANDUM

CAMPBELL, District Judge.

Pending before the Court are Defendant's Motion for Summary Judgment (Docket No. 8) and Plaintiff's opposition thereto (Docket No. 18). The Court heard oral argument on Defendant's motion on June 28, 1996. For the reasons stated herein, Defendant's Motion for Summary Judgment (Docket No. 8) is GRANTED, and the result ordered by the administrative law judge in this case is AFFIRMED.

Plaintiff filed this civil action under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401, *et seq.*, for administrative review of the Final Order of an Administrative Law Judge, pursuant to 20 U.S.C. § 1415(e). The issue presented is whether the public school system should provide reimbursement for the costs of a unilateral residential placement made by the parents of a seriously emotionally disturbed student who, prior to that placement, had never been in the public school system.[1]

Plaintiff and his parents are, and have been at all relevant times, residents of Nashville, Tennessee. From the time Plaintiff reached school age through the end of his enrollment at Grove School, the private residential school in Connecticut for which he seeks reimbursement, Plaintiff had been enrolled in only private schools. In other words, Plaintiff was never in the public school system in Nashville, Tennessee.

Plaintiff was enrolled first in St. Paul's, then in Westminster School, and then in Benton Hall, all private schools in Nashville. Following an incident in which Plaintiff assaulted a teacher at Benton Hall, Plaintiff's parents withdrew him from Benton Hall and enrolled him at Grove School in Connecticut from July of 1992 until June of 1994.

It is undisputed that the Defendant public school system had no involvement in or knowledge of the parents' decisions to place Plaintiff in any of the above-

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[1] The issue is NOT the appropriateness of Plaintiff's placement – either at present or at the Grove School.

mentioned private schools, including Grove School. It is undisputed that the parents never consulted the Defendant public school system about enrolling Plaintiff in Grove School. Plaintiff's father testified that he did not consider asking anybody in the public school system for services when Plaintiff was required to leave Benton Hall.

Plaintiff's father is a physician specially trained in psychiatry, child psychiatry and psychoanalysis who has, as twenty-five percent of his practice, children and adolescents as patients. He knew that Defendant provides special education classes and that Defendant refers children on a regular basis to Westminster and Benton Hall.

Plaintiff's older sister was enrolled in the Defendant school system. Dr. Warren Thompson, a school system psychologist, testified that Plaintiff's mother contacted him a number of years ago to discuss her daughter's (Plaintiff's older sister) educational placement and handicapping conditions. Dr. Thompson stated that the parents were aware they could contact him about special education services. Plaintiff's father testified that their experience with the Defendant school system had not been helpful with their daughter; therefore, they did not place their son (Plaintiff) into that system.

Benton Hall, where Plaintiff was enrolled prior to Grove School, services a large number of students through contract with Defendant. Benton Hall's principal testified that he is familiar with the process for developing an individualized education program ("IEP"), the procedures for obtaining special education services through Defendant, and how to access those programs.

On October 20, 1993, after Plaintiff had been at Grove School more than one year, Plaintiff's attorney requested a multidisciplinary team ("M-team") meeting with Defendant to address the Plaintiff's educational needs and to discuss reimbursement for the past placement in the private residential program. A number of M-team meetings were held and various information was requested. During the time Defendant was conducting these M-team meetings and trying to get certification for Plaintiff and develop an IEP, as required by law, Plaintiff was in Madison, Connecticut, at the Grove School. On April 25, 1994, Defendant certified Plaintiff as learning disabled, but it denied the parents' request for reimbursement.

After a due process hearing before an administrative law judge ("ALJ"), as required by IDEA, the ALJ issued her Final Order in favor of Defendant. From that Order, the parents and Plaintiff have appealed.

Defendant has moved for summary judgment, arguing that because Plaintiff was never in the public school system and Defendant never had the opportunity to evaluate him and to design a suitable educational program, Plaintiff is not entitled to reimbursement for his parents' unilateral placement in the private residential school. Plaintiff's parents contend that they were not aware of the special education services offered by Defendant and, therefore, could not seek such services. Plaintiff also asserts that Defendant failed in its "child find" responsibilities[2] under the law and should be estopped to deny reimbursement in this case.

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[2] "Child-find" under the IDEA requires development and implementation of a plan to assure that as many disabled

The IDEA was enacted "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c). The IDEA establishes procedural safeguards with respect to the provision of a free appropriate public education. 20 U.S.C. § 1415. Included in those procedural safeguards is the right to an impartial due process hearing by a State or local educational agency for parents or guardians who consider their child's IEP inappropriate. 20 U.S.C. § 1415(b)(2) and (c). Any party aggrieved by the findings and decisions made under subsection (b)(2) or (c) of Section 1415 may file a civil action for administrative review in the United States District Court. 20 U.S.C. § 1415(e).

On appeal from a determination by an ALJ in an IDEA case, the Court has "modified de novo review," meaning that the Court should give due weight to the ALJ's decision. *Metropolitan Nashville and Davidson County Sch. Sys. v. Guest*, 900 F.Supp. 905, 907 (M.D.Tenn.1995).

If Defendant acts through an IEP to place a child in a private setting, Defendant must pay the costs. *Id.* at 910. "The same is not true when the parents unilaterally place the child in a private setting." *Id.* at 911. The IDEA requires that the State must assure that:

> handicapped children in private schools and facilities will be provided special education and

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students as possible are identified and served by the public school system. *See* 20 U.S.C. § 1412(2); 34 C.F.R. §§ 300.128 and 300.220.

> related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, *if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency* as the means of carrying out the requirements of this subchapter. . . .

20 U.S.C. § 1413(a)(4)(B) (emphasis added). But the local school system bears such financial responsibility only when the child is in the private facility or school because that local school system developed an IEP which placed him there. *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 183 (6th Cir.1996).

The federal regulations concerning the IDEA provide:

> If a child with a disability has [free appropriate public education] available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility.
>
> 34 C.F.R. § 300.403(a).

"It is axiomatic that a school system's obligation to provide free appropriate public education extends only to those students who are enrolled in that school system. Until the child is enrolled in the system, the system has no responsibility to evaluate or formulate a program for that student." *Robertson County School System v. King*, 22 IDELR 451 (M.D.Tenn.1995), *appeal docketed*, No. 95-5529 (6th Cir. April 25, 1995).

In *Robertson County*, a judge of this Court found that the mother had "preempted" the school system's responsibility. "Indeed, it would stretch the requirements of the IDEA beyond reason and common sense to suggest that the IDEA mandates that the School System expend time, money, and resources evaluating a child who is not within its control but is enrolled in the private school system." *Id.*

There is a difference between a unilateral parental transfer made after consultation with the school system, yet still without the system's agreement, and transfers made truly unilaterally, with no attempt to achieve a negotiated compromise and agreement on a private placement. Here, not only was there no attempt to achieve a negotiated compromise, but also the parents never even contacted the school system before enrolling their child in the private residential school.

The parents argue that they did not know about the services offered by the school system and did not know that they could be reimbursed for private school tuition costs. The parents basically allege that Defendant failed in its responsibilities to give them notice concerning their rights under the IDEA, and, therefore, the school system should be estopped to deny reimbursement.

The school system does have an obligation, under the IDEA, to seek out disabled children. Specifically, "participating states must implement policies and procedures such that all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services,

are identified, located and evaluated." *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 589 (9th Cir.1992).

The ALJ in this case found that Defendant's efforts at fulfilling this obligation were inadequate. Nonetheless, the ALJ found that the lack of "child find" in this case was outweighed by the parents' actual knowledge about the school system and its services. Final Order, p. 9. The ALJ found that the parents chose a private school education for their son based on specific experiences they had with an older daughter educated in Defendant's public school system. *Id.* The ALJ also considered the father's educational background and work experience and the testimony of several witnesses as to the parents' knowledge of alternative programs within Defendant's system as indicative of the parents' knowledge. *Id.*

This case is not like *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir.1985), where the child was in the public school system and the system failed to inform the parents about their rights. In *Hall*, the school system's obligations to the disabled child were clear and the child was continuously available to the school district for assessment. *See Ash*, 980 F.2d at 589. Here, the child was never available to the public school system prior to his enrollment at Grove School. He was never in the public schools. His parents never approached the public school system to give that system an opportunity to evaluate and develop an IEP for Plaintiff.

If the school district provides a free appropriate public education, yet the parents wish to place their child in a private school, the parent must pay the tuition. *McNair v. Oak Hills Local School Dist.*, 872 F.2d 153, 156 (6th

Cir.1989). Here, the school system certainly could provide a free public education; we do not know whether it would have been appropriate for Plaintiff, because Defendant was never given the opportunity to develop it.

As the court stated in *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149 (3d Cir.1994), "the court would be left to hazard conjecture or hypothesis as to what the Board of Education might have proposed" had it been given the opportunity before Plaintiff was enrolled in Grove School. *Id.* at 158. "[T]he right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP." *Id.* Here, the parents did not even give Defendant an opportunity to develop an IEP which they could contest.

For these reasons, the Court finds that the parents' unilateral placement of Plaintiff in a private residential school, without giving Defendant the opportunity to evaluate him and propose an IEP, precludes their reimbursement for the costs of that unilateral placement. Therefore, Defendant's Motion for Summary Judgment (Docket No. 8) is GRANTED, and the result of the decision of the ALJ is affirmed.

It is so ORDERED.

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: M.R.	)	
MICHAEL KENNER	)	
V.	)	
METROPOLITAN NASHVILLE AND DAVIDSON COUNTY SCHOOL SYSTEM	)	No. 94-71

FINAL ORDER

THIS cause came to be heard on the 5th day of June, 1995, before the Honorable Linda G. Welch, Administrative Law Judge for the State of Tennessee, Department of Education, Special Education Division, upon request for a Due Process Hearing by the parents, submission of pre-hearing briefs, testimony of witnesses by both parties, introduction of exhibits by both parties, Findings of Facts and Conclusions of Law submitted by both parties, and the record as a whole, from which this Administrative Law Judge finds as follows:

The issue in this case is whether Metro-Davidson County School System should provide reimbursement for costs of a unilateral residential placement made by the parents of a seriously emotionally disturbed student, who, prior to said placement, had always been in private schools.

The student in this cause of action is and has been a resident of Nashville, Tennessee at all times relevant to

this matter. From the time the student reached school age he was enrolled in private schools, starting with St. Pauls, then Westminster School and then to Benton Hall, all located in Nashville, Tennessee. Following an incident in which the child assaulted a teacher, a residential placement was obtained at the Grove School in Connecticut from July of 1992 until June 16, 1994. In the fall of 1993, the parents requested an M-Team Meeting to consider the student's educational needs and also for reimbursement for the Grove School expenses. A number of M-Team Meetings were held on November 15, 1993, April 4, 1994, and April 25, 1994. It was at the last M-Team Meeting that the parents' request for reimbursement were denied. At the time of the initial request in October of 1993, the school system was provided with statements from two licensed psychologist, one of whom the school system subsequently relied upon to certify this student as seriously emotionally disturbed and learning disabled.

The student, prior to the time of the placement, at issue was attending school at Benton Hall, a self-contained special education day school. During the 1991-1992 school year at Benton Hall this child was characterized by various mental health professionals as seriously emotionally disturbed, learning disabled and oppositionally defiant.

At the end of that school year, following a series of assaultive, aggressive, defiant and verbally aggressive behavior, he pushed a teacher, which resulted in his dismissal from that school. The student had been treated by Steve Snow, M.D., a child and adolescent psychiatrist, since 1989 on a regular basis (once to twice a week) and was being seen once a week in 1991-1992 while a student

at Benton Hall. Additionally this psychiatrist consulted regularly with the school personnel at both Westminster and at Benton Hall. Both Westminster and Benton Hall are private day schools which specialize in educating children with learning disabilities. The child was psychologically tested in 1990 and twice in 1993 by Joseph D. Labarbera, Ph.D, a licensed psychologist located in Nashville, Tennessee. Additionally both parents were involved in working with the schools in an effort to assist this child. Therefore, there seems to be no bonafide dispute as to the fact that this child was learning disabled and that by the school year of 1991-1992, he was experiencing severe emotional difficulties which affected all areas of his life, including his education.

After assaulting the teacher at Benton Hall, it was the treating psychiatrist's opinion, as stated via his deposition, that this child's needs could be met only in a full time residential placement. Testimony from Mike Purcell, the student's principal at Benton Hall, indicated that the child could not attend Benton Hall any longer, that another placement was necessary and that he worked with the father in contacting at least some potential placements. This principal testified he relied primarily on the opinion and expertise of the student's father as the father was a physician specially trained in psychiatry, child psychiatry and psychoanalysis. The principal, a witness for the parents, specifically testified that "The thing about (the student's father) is that he is somewhat in the business of working with troubled adolescents who may have a need for alternative educational placements." He further testified with reference to the student's parents, "these people knew what they were doing." Further,

about one-fourth of the father's practice in psychiatry deals with adolescents. He also teaches child psychiatry at Vanderbilt University.

The parents argue that their knowledge of the educational opportunities offered by the Metro-Davidson County School System is of paramount importance in this case. If it is deemed that the parents knew or had reason to know of the services offered to special education students by the public school system then recovery for the residential treatment costs at Grove School would, arguably, not be appropriate. Conversely, if the parents did not know of the services, then, they argue, that the school system should be liable for $80,000 + in expenses for the unilateral out-of-state residential placement of the student.

This Administrative Law Judge is not convinced that these parents did not know of services or at least had reason to know of such services. Additionally, even if they had not known of such services, it is not axiomatic that recovery would follow. The facts in this case reveal that this family has had experience in dealing with the public school system as their oldest child, a daughter who is approximately six or seven years older than the student at issue, was a public school student in the Metro-Davidson County System for several years. Testimony was offered that the mother of these two children contacted Warren Thompson, Ph.D., a Metro-Davidson County School Psychologist, to discuss the daughter's "educational placement and handicapping conditions." Dr. Thompson further testified that he clearly remembers discussing a regular school program at Hillwood High School for the daughter, and that the mother preferred a

more restrictive program. In fact, the daughter was subsequently sent by the parents to Menninger Clinic, an acute psychiatric hospital located in Topeka, Kansas, where she stayed for approximately eleven months. The parents neither asked for, nor were granted, any remuneration for these expenses by the Metro System. (The father testified that had they known that the Metro System could have provided placement or reimbursement for their son they would have pursued that avenue). The father further testified that their experience with the Metro Davidson County School System had not been helpful with their daughter; therefore, they did not place their son, who is the subject of this case, into that system.

The father testified that he was never notified specifically as to the availability of special education programs through the Metro Schools. This testimony was buttressed by testimony offered by Metro's Director of Special Education, who stated Metro had no contact with this student prior to his placement at the Grove School. No testimony was given by any of the school system's witnesses that the parents were specifically given information with regard to these resources. A witness for the school system, Warren Thompson, Ph.D., did state that it was the responsibility of the private school (in this case Benton Hall personnel) to say that their program wasn't appropriate. He further testified that he spoke specifically with the principal at Benton Hall, Mike Purcell, about this case after the child had been moved to the Grove School, and was told that "Genesis" a Metro-Davidson County Day School, was the next logical step for this student. However, Mr. Thompson did not know if

that program had been recommended. Mr. Purcell testified he did not recall whether or not he told these parents that they ought to go to the Metro School System for evaluation and placement of their son; however, he was "almost sure I would have said something about public school offerings." Margaret Horsnell, Director of the Special Education Department for Metro-Davidson County School System, testified she had talked with Mr. Parcell [sic] and he stated he had discussed public school services with this student's parents but they were not interested.

The issue with regard to whether or not appropriate information was provided by the school system to parents who enroll their children privately in one of the special day schools in the Metro System is most troubling to this Administrative Law Judge. Testimony was given by the Metro-Davidson County Director of Special Education, Margaret Horsnell, that Metro Schools do not have to individually contact the parents of private school students to inform them of services through the public schools. One reason given was that Metro does not have access to the names and addresses of these private school students. However, Westminster and Benton Hall, schools this student attended, are schools specifically geared toward learning disabled students. In fact a large number of Benton Hall students are there via contract with the Metro School System. The Metro System must provide notice of special education services to parents of the these children. Therefore, the school system has knowledge that these children either are handicapped or disabled within the meaning of the law or may be so. This school population is not difficult to find or ascertain. Privacy

issues were raised with regard to giving individual names of students; however, were that to be a problem it would seem simple indeed to secure the exact number of students in the school and provide information for each student without checking into specific identities. Further, Ms. Horsnell testified that Metro School System has never asked Benton Hall or like schools to provide Metro access to their list of students. It is simply left to these private day schools to make these referrals to Metro. As these program are ones in which the school system already has a relationship due to contracts with the system, this should not be a problem for the system.

The Administrative Policies and Procedures require "Each school system shall develop and implement procedures for creating public awareness of special education programs, for advising the public of the rights of eligible children and parents, and alerting community residents of the need for identifying and serving eligible children." Additionally, "The system shall develop an ongoing system to locate, identify and evaluate all children ***suspected*** of being eligible who are not currently enrolled in the public school educational program who meet the age requirements and reside in the school system." It seems clear that the school system is not meeting an obligation to locate and evaluate children who are suspected of being eligible in the context of private school placements geared for learning disabled students. Although, the school system has provided evidence, via testimony, that the parents knew of school services, they are unable to provide **documentation** that this particular child was offered special education services though the Metro School System. This is significant as the System

already knows or has reason to know that this student population could reasonably be suspected of being eligible for services.

The parents requested a M-Team Meeting in October of 1993, to address evaluation and reimbursement of private school expenses at the Grove School; however, it wasn't until the latter part of April of 1994 (following three M-Team Meetings) that the school system certified the child as disabled yet denied reimbursement for services. The child was diagnosed as learning disabled and seriously emotionally disturbed and was certified on that basis. In fact these conditions had been ascertained years before the certification by health care professionals outside of the school system. The school system argues that they never had an opportunity to evaluate this student therefore no obligation for reimbursement ensues. Even though "child find" with regard to private schools specializing in educating disabled children is found to be inadequate in this case, this finding must be viewed in light the fact that these parents chose a private school education for their son based on specific experiences they had with an older daughter educated within the Metro System, the father's educational background and work experience, and testimony of several witnesses as to the parents' knowledge of alternative programs within the Metro System. In this case, the parents' knowledge must outweight the lack of "child find" by the Metro System.

The Metro School System asserts that the student lacks standing to pursue this action because he was never enrolled in the school system. As the Court in *Robertson County School System vs. King, et.al,* 22 IDELR 45, (Tenn. 1995). (currently on appeal to the Sixth Circuit), held (in a

case similar to this in that a parent was requesting reimbursement for private school tuition when the child had not been enrolled in the public school system), "because the student was never enrolled in the school system, the system had no duty to evaluate or place the student." Additionally, the Court in *Burlington School Comm v. Massachusetts Department of Education*, 471 U.S. 359 (1985) as well as federal regulations, state that the system has no responsibility to evaluate or formulate a program for a student, until the student is enrolled within the system, (See 34 C.F.R. § 300.403(a)(1994)), nor do they have an individual entitlement to services under IDEA. See *Office of Special Education Programs Memorandum 94-17 to Chief State School Officers*, 20 IDELR 1440, 1441 (OSEP 1994). Additionally, the Court in *Hendrich Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982) held that "'free appropriate public education' is special education and related services which are provided free of charge, conform to the standards of the state educational agency and which are provided in accordance with an IEP." Therefore if a student has not availed himself of the public school system, that system has no obligation to provide reimbursement for additional private school tuition. While there may be exceptions to this legal reasoning this case does not appear to merit the states of such an exception due to the parents knowledge of the availability of special education services within the Metro System and their decision not to avail themselves of those services.

Arguments can be made that reimbursement should at least be given for this child's private school expenses within 10 days of the parents' request for an M-Team meeting. Indeed it took several months and three M-Team

meetings for the system to decide that reimbursement was not going to be awarded. While it appears this process could have proc [sic] at a faster pace part of the difficulty lay in evaluating a child located in Connecticut. The Metro System did send a school psychologist to the Grove School to evaluate the program and to observe the child. Further, difficulty arose in agreeing on professional opinions with regard to certification of the child. Therefore, the extended period of time to reach a conclusion is viewed as part of the process in evaluating a child placed at such a great distance from the Metro System's resources and thus this time period, for this case, is considered reasonable. Therefore, for this reason no reimbursement for services seems appropriate for that time period as well.

WHEREFORE, IT IS THEREFORE ORDERED that:

1. The Metro-Davidson County School System is the prevailing party in this matter and therefore the requested award for reimbursement of costs for the student is denied.

2. As the student is not the prevailing party an award of attorney's fees is not reasonable.

3. "Child find" as related to locating students suspected of being eligible for services in a private school setting which is specifically geared for learning disabled students is found to be inadequate but is outweighed by the parents' knowledge of services in this particular case.

Entered this 26th day of September, 1995.

/s/ Linda G. Welch
Linda G. Welch
Administrative Law Judge

20 USCA § 1412 Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

* * *

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that –

* * *

(2)(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

* * *

(7) The State shall assure that

* * *

(B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies,

programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

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20 USCA § 1413 State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall –

> (1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;
>
> * * *

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20 USCA § 1414 Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an

application to the appropriate State educational agency. Such application shall –

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which –

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

* * *

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20 USCA § 1415 Procedural safeguards

* * *

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to –

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement

of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit –

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

* * *

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

* * *

(e)(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who

does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

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34 CFR § 300.128 Identification, location, and evaluation of children with disabilities

(a) General requirement. Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, to ensure that –

(1) All children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and

which children are not currently receiving needed special education and related services.

(b) Information. Each State plan must:

(1) Designate the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section.

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation.

(3) Describe the extent that –

(i) The activities described in paragraph (a) of this section have been achieved under the current State plan; and

(ii) The resources named for these activities in that plan have been used.

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes.

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains –

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures.

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

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34 CFR § 300.220 Child identification

Each application must include procedures that ensure that all children residing within the jurisdiction of the LEA who have disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, including a practical method for determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

CHILD IDENTIFICATION POLICY

Metro's Child Identification Policy

Appropriate procedures are being used to identify, locate, evaluate and determine the eligibility of children for special education and related services.

X
Yes ___ No*

Responsibility

One person is appointed to be responsible for all chid [sic] identification activities.

Name Dr. C. W. Zellner

Position Coordinator, Special Services

Community Awareness

Procedures are being used to create community awareness of special education programs, for advising the public of the rights of eligible children and parents, and alerting community residents of the need for identifying and serving eligible children.

X
Yes ___ No*

Type of Activity	Month(s)	Documentation
[X] Radio spot announcements	March & Sept	Air dates, copies of text
[X] TV spot announcements	March & Sept	Air dates, copies of text
[X] Newspaper articles	March & Sept	Newspaper copies
[ ] Stuffers for utility bills, bank statements, grocery bags, etc.		Locations, dates logged, copies
[ ] Posters		Locations, dates logged, written summary of content
[X] Brochures distributed in public places	March	Copies, list of types of recipients
[X] Newsletters to other agencies	March	Copies, list of recipients
[X] Letters to parents	March	2 Copies, list of recipients
[ ] Appearance before civic groups	Scheduling Varies	Log of dates, written summaries of content
[ ] Appearance before PTAs and other parent groups	Scheduling Varies	Log of dates, written summaries of content
[ ] Appearance at health fairs	Scheduling varies	Dates, written summaries
[X] Other All physicians/hospitals sent information	March	

Referral

1. A Comprehensive Screening Program designed to identify high risk students has been developed and results in the referral of high risk (potentially eligible) students.

   X
   Yes No*

2. Before referring a child for an individual evaluation, the appropriate school personnel shall attempt to meet the needs of the child within the regular school program.

   X
   Yes No*

3. An organized referral process is developed and maintained which is communicated to all professional personnel within the system, parents, and persons within the community.

   X
   Yes No*

4. List the sequence of steps to be taken in making a referral (general) and the persons responsible within the school and at the school system level.

   Referrals for formal evaluations may be made by the teachers, principals, parents, other professionals and in some cases, the student. Screening data and informal referral information are reviewed prior to an evaluation by an assessment specialist. In all cases prior to a comprehensive evaluation, informed parental consent is obtained. All procedures follow regulations adopted in 1987.

17 EHLR 484

Cohocton (NY) Cent. Sch. Dist. (Assessment)

Office for Civil Rights, Region II

NOVEMBER 21 1990

Learning Disability, Identification and Evaluation

Placement, Learning Disability

Least Restrictive Environment (LRE), Learning Disability

Summary

The complainant alleged that the district failed to properly identify and evaluate students suspected of having learning disabilities and placed students classified as learning disabled outside of the district without consideration of their individual needs.

HELD: for the district.

OCR determined that the district made sufficient efforts to locate and identify all children with suspected disabilities in its jurisdiction, including children with learning disabilities, in compliance with Reg. 104.32(a) and (b). Furthermore, OCR found that children classified as learning disabled were provided educational programs pursuant to their IEPs, integrated educational settings, and opportunities for interaction with nondisabled peers, in accordance with Regs. 104.33(a) and (b) and 104.34. Finally, OCR concluded that the district's system of procedural safeguards complied with the requirements of Reg. 104.36.

Mr. Robert Wood
Superintendent
Cohocton Central School District
30 Park Avenue
Cohocton, NY 14826

Complaint No. 02-90-1054

The New York Regional Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint filed against the Cohocton Central School District (the District). The complainant alleges that the District discriminated against learning disabled (LD) students on the basis of handicap. Specifically, the complainant alleges that in the 1989-90 school year the District failed to locate, identify and refer for evaluation students suspected of being handicapped. Additionally, the complainant alleges that the District placed his son (the student) and all other students classified as LD to special education programs outside of the District, including the Board of Cooperative Educational Services (BOCES), without considering the students' individual educational needs. The complainant also alleges that the District fails to notify parents of their due process rights. Further, the complainant alleges that on April 2, 1990, in retaliation for his having filed charges with the Cohocton School Board against the Superintendent on March 28, 1990, his two children were discharged from their bus at the school, whereas the other students on the bus received door-to-door transportation.

This complaint was investigated under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, published at 34 C.F.R. Part 104, which prohibit

discrimination, on the basis of handicap, in any program or activity receiving Federal financial assistance from the United States Department of Education (the Department). OCR has determined that the District is a recipient of such assistance from the Department. Therefore, OCR has jurisdiction to investigate these allegations and make a compliance determination.

During the preliminary stage of the investigation, OCR determined that the complainant had requested an impartial hearing regarding some of the issues raised in the complaint. An impartial hearing was conducted on January 4, 1990, and the complainant had an opportunity to participate and be represented by counsel. The allegation of placement for the individual student was addressed and determined in that hearing. Thus, at the time of the filing of the complaint (April 10, 1990), the issue of placement for the student had been determined. Therefore, OCR did not investigate this issue. Based on the above, OCR is administratively closing this portion of the complaint as of the date of this letter.

OCR conducted an investigation of the issues of identification and location of handicapped students, free appropriate public education and procedural safeguards for the class of LD students and, with respect to the student, the issue of retaliation. During the course of this investigation, OCR interviewed the complainant, the District Superintendent, the Director of Special Education, the BOCES Supervisor, the Transportation Manager and the bus driver. In addition, OCR reviewed 1989-90 individualized educational programs (IEP) for LD students, minutes from Committee on Special Education (CSE) meetings and documents provided by the District and the

complainant. Based on an analysis of the information obtained during this investigation, OCR has determined that the District is in compliance with Section 504 and its implementing regulation, at 34 C.F.R. §§ 104.32, 104.33, 104.36 and 104.61, with respect to the issues. Therefore, we are closing this case as of the date of this letter. A summary of the factual and legal bases for our determination follows.

The protections of Section 504 extend only to qualified handicapped persons. The Section 504 regulation, at 34 C.F.R. § 104.3(j)(l), defines a handicapped person as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Major life activities are defined as functions such as caring for one's self, performing manual tasks, hearing, learning, and working. *See* 34 C.F.R. § 104.3(j)(2). With respect to elementary and secondary education programs, a qualified handicapped person is one who is of an age during which nonhandicapped persons are provided educational services or of any age during which it is mandatory under state law to provide such services. *See* 34 C.F.R. § 104.3(k)(2).

The Regulations of the Commissioner of Education for the State of New York provide that services be offered for handicapped persons between the ages of 3-21. The complaint was filed on behalf of 16 handicapped students whose ages range between 8 and 20. All were classified as LD by the District's CSE and enrolled in the District during the 1989-90 school year. Therefore, OCR concludes that the students are qualified handicapped persons.

Identification and Location

The complainant alleges that the District failed to locate and identify students suspected of being handicapped in the 1989-90 school year. The Section 504 regulation, at 24 C.F.R. § 104.32, requires that recipients annually undertake steps to identify and locate every qualified handicapped person residing in its jurisdiction who is not receiving a public education.

OCR's investigation revealed that the District has established administrative procedures for locating and identifying students within its jurisdiction who may be in need of special education services. The District's outreach efforts to identify and locate handicapped persons who are not receiving a public education include the annual publication of articles in several newspapers serving the District. The District also sends a newsletter to every parent/guardian of students already attending District schools, informing the parent/guardian of the District's obligation to locate handicapped students. Additionally, the District mandates a diagnostic screening of all new entrants in grades kindergarten through twelve to determine if they may be possibly handicapped or gifted. The diagnostic screening includes medical, speech and basic skills evaluations. During the screening process, students suspected of having handicapping conditions are referred for further evaluation. In addition, students who are already in attendance in the District and are experiencing learning, behavior or emotional difficulties that interfere with their academic progress are identified by their classroom teachers and recommended for evaluation. Prior to the referral for evaluation, students may be provided with intervention services.

OCR found that the District identified eight students who were suspected of being handicapped in the 1989-90 school year. Of these, six were suspected of having a learning disability. The remaining two were suspected of having other handicapping conditions. Four were subsequently classified as LD and the other two were determined not to be handicapped.

OCR concludes that the District has undertaken steps to identify and locate every handicapped person residing within its jurisdiction who is not receiving a public education. Therefore, OCR finds that the District is in compliance with 34 C.F.R. § 104.32(a) and (b), with respect to this issue.

Free Appropriate Public Education

The complainant alleges that the District categorically places LD students in special education programs outside the District, including BOCES, without considering the students' individual educational needs.

The Section 504 regulation, at 34 C.F.R. § 104.33(a) and (b)(1), requires that a recipient provide a free appropriate public education to each qualified handicapped person in its jurisdiction regardless of the nature or severity of the handicap. An appropriate education is the provision of regular or special education and related aids and services that: (i) are designed to meet the individual needs of handicapped persons as adequately as the needs of non-handicapped persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements of the Section 504 regulations at 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and

104.36 (procedural safeguards). Implementation of an individualized educational program (IEP) in accordance with the provisions of the Education of the Handicapped Act (EHA) is one means of meeting the Section 504 standards.

As a matter of policy, except in extraordinary circumstances, OCR does not review the results of individual placement and other educational decisions made by recipients. In cases where parents are dissatisfied with a school district's educational decision, OCR examines the procedures for providing a free appropriate public education to determine whether they comply with the Section 504 "process" requirements concerning identification, evaluation, placement and due process.

As part of the placement process, recipients must document that placement in the regular educational environment is offered to handicapped students unless it is demonstrated that such education, with the use of supplementary aids and services, cannot be achieved satisfactorily. Whenever a student is placed in a setting, other than the regular educational environment, a District is required to take into account the proximity of the alternate setting to the student's home. Further, the District must ensure that all handicapped students are provided nonacademic and extracurricular activities in a setting with nonhandicapped students to the maximum extent appropriate to the handicapped student's needs.

In Appendix A to 34 C.F.R. Part 104, Subpart D, Item 24, guidance is provided for the regulatory requirement cited above. "A handicapped student may be removed from

the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting." The guidance also refers to nonacademic services being provided in " . . . as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children most of the day."

The District is comprised of one school, which houses grades kindergarten through 12. The District has a total enrollment of approximately 262 students, of whom 24 have been classified as having handicapping conditions. Of this group, the District has identified 16 students as being LD. The District has contracted with the Steuben-Allegheny BOCES to provide LD students with educational services for several reasons. Specifically, the District is located in a rural area with law [sic] enrollment. Additionally, the LD students range from grades one through twelve, with no majority in any one specific grade.

During the 1989-90 school year, the 16 LD students were placed in three districts: Cohocton and two neighboring school district, Hornell and Wayland. Fourteen students were placed in Hornell and Cohocton and Wayland serviced one student each. OCR learned that all but one of the students placed outside of the District are approximately 15 minutes away from the school they are attending. The remaining student, in order to receive appropriate educational services, must travel one hour. This period of travel is not considered excessive as it exceeds that of an in-district placement for that student

by 15 minutes. Therefore, the proximity of all placements were not substantially different that the results of in-district placements.

Of the 16 LD students, 11 were provided with a special education program in Option II classes, and 4 were provided with resource rooms, in the BOCES integrated facility. Additionally, one student was in a resource room placement out-of-District.

OCR reviewed the special education records of all LD students for the 1989-90 school year. OCR's investigation revealed that all LD students participated with nonhandicapped students in special subjects, and academic subjects where an integrated class setting was recommended in their IEPs. OCR finds that LD students were provided with educational programs in accordance with their 1989-90 IEPs and that the educational programs and services were provided in an integrated setting. Therefore, OCR has determined that the District is in compliance with 34 C.F.R. §§ 104.33(a), (b) and 104.34, with respect to the allegation.

Procedural Safeguards

The complainant alleged that the District failed to notify parents of their due process rights. Additionally, he alleged that the student's placement was secured only after legal action was threatened and an impartial hearing was requested.

The Section 504 regulation at 34 C.F.R. § 104.36, requires that a recipient establish and implement a system of procedural safeguards which are to be afforded to parents

and guardians before actions are taken regarding the identification, evaluation, or educational placement of handicapped persons who need special instruction or related services. The system of procedural safeguards must include notice, an opportunity to examine relevant records, an impartial hearing with the opportunity for participation and representation by counsel and a review procedure. The regulation provides that compliance with the EHA procedures is one means of meeting this requirement.

OCR found that the District established and implemented a system of procedural safeguards. These safeguards include notice, an opportunity for parents/guardians to examine relevant records, and an impartial hearing which includes an opportunity for participation by parent/guardian and representation by counsel. OCR's investigation revealed that, with the exception of the complainant, all parents and/or guardians of LD students were provided with due process notice. The District's failure to provide the due process notice to the complainant was the subject of and resolved through an impartial hearing. This issue is now moot and no further action is necessary by OCR. Therefore, OCR has determined that the District is in compliance with 34 C.F.R. § 104.36, with respect to the allegation examined.

Retaliation

The complainant alleges that on April 3, 1990, in retaliation for his having filed charges with the Cohocton School Board against the Superintendent on March 28, 1990, his two children were discharged from their bus at

the school, whereas the other students on the bus received door-to-door transportation.

In conducting an harassment/retaliation investigation, OCR must initially determine whether:

1. The complainant participated in a statutorily protected activity;

2. There was an adverse action contemporaneous with or subsequent to the protected activity;

3. The recipient had knowledge of the complainant's protected activity; and

4. There is evidence of a causal connection between the complainant's activity and the alleged adverse action of the District.

When the above occurs, a recipient is given the opportunity to offer an explanation for its action. If an explanation is provided, it is examined to determine whether the reason for the recipients's action is legitimate and nondiscriminatory, and not a pretext for discrimination.

OCR's investigation revealed that the complainant is a parent of a handicapped student placed in the District. On January 4, 1990, the complainant requested and participated in an impartial hearing, challenging, among other matters, the District's evaluation of the student. Additionally, on March 28, 1990, the complainant filed charges against the Superintendent, with the President of the Cohocton Board of Education (the Board), alleging official misconduct, discrimination and incompetence. Accordingly, OCR concludes that the complainant engaged in a protected activity.

With respect to whether the complainant's children were discharged from their bus at the school on April 3, 1990, OCR has determined that the complainant's wife sent a note to the bus manager on Monday, April 2, 1990, outlining transportation requests for that week, as was customarily her habit. The note requested that her two children ride the bus home on Monday and Thursday, and walk to the babysitter's home from the school on Tuesday, Wednesday and Friday. The written instructions for Tuesday, April 3, 1990, made with the knowledge that the children would be released early that day due to a scheduled evacuation drill, were that the children were to walk to the babysitter's home. OCR discovered that the bus driver released the students at the school based upon the complainant's instructions. Therefore, OCR has determined that the students were treated in accordance with the complainant's stated wishes and were not subjected to any adverse action.

OCR has determined that the complainant engaged in a protected activity, but the students did not suffer adverse action. Thus, all elements of a case of retaliation have not been established. Therefore, OCR finds that the District did not retaliate against the students, as alleged. Accordingly, OCR has determined that the District is in compliance with the Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates by reference 34 C.F.R. § 100.7(e).

This letter is not intended, nor should it be construed, to cover any issues regarding the District's compliance with the regulation implementing Section 504 that are not specifically discussed in this letter. The District is

reminded that retaliation or harassment against any person who has filed a complaint, participated in, or cooperated with an OCR investigation is prohibited.

Under the Freedom of information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

We appreciate the cooperation and assistance of your staff during the investigation. If you have any questions, please contact Agnes Northern, Director, Elementary and Secondary Education Division, at (212) 264-5189.

Paula Kuebler

Regional Director

17 EHLR 843

DeSoto County (MS) Sch. Dist. (ADD)

Office for Civil Rights, Region IV

FEBRUARY 15 1991

ATTENTION DEFICIT DISORDERS (ADD/ADHD)

Due Process Hearings, Persons Entitled to Hearing

Procedural Safeguards, Notice

Rehabilitation Act (Section 504), Procedural Safeguards

Summary

The complainant alleged that the district failed to identify, evaluate, and place children with handicapping conditions in accordance with Section 504, after these children were determined to be ineligible under the IDEA.

HELD: for the district, in part.

OCR determined that the district properly identified and evaluated all of its students with handicapping conditions, even those determined to be ineligible under the IDEA, and provided each of these students with appropriate educational services based on individual need; therefore, the district was in compliance with Regs. 104.32(a) and (b), 104.33(a) and (b), and 104.35(a), (b) and (c). However, during its investigation, OCR found that the district violated Reg. 104.36 by failing to provide access to due process hearings to students with handicapping conditions who were not otherwise eligible under the IDEA.

Dr. Albert L. Broadway
Superintendent
DeSoto County School District
655 Holly Springs Street
Hernando, MS 38632

Complaint No. 04-90-1294

The Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against the DeSoto County School District (District). The complaint was filed pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. Section 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of handicap in any program or activity receiving Federal financial assistance from the U.S. Department of Education. The District receives such assistance and is, therefore, subject to the requirements of Section 504.

The complainants alleged that the District discriminates against handicapped children who meet the definition of a handicapped person under Section 504, but who are not considered handicapped under the Individuals with Disabilities Education Act (IDEA), formally referred to as the Education of the Handicapped Act (EHA). Specifically, the complainants alleged the District fails to identify, evaluate, and place handicapped children in accordance with Section 504, and has not established procedural safeguards in accordance with Section 504.

OCR's investigation included a review and analysis of records and documents, and interviews with District staff, the complainants and the complainants' witnesses. Based on the available evidence, we conclude that the District is not in violation of Section 504 with respect to

the identification, evaluation, and placement of handicapped students. The District, however, is in violation of Section 504 because it has failed to provide procedural safeguards in accordance with the Section 504 implementing regulation. On February 8, 1990, the District provided an assurance that this violation will be remedied. We are, therefore, closing this case as of the date of this letter. The factual and legal bases for our findings are set forth below.

Identification, Evaluation, and Placement

The regulation implementing Section 504 at 34 C.F.R. Sections 104.32 requires the District to undertake to identify and locate each qualified handicapped student within its jurisdiction that is not receiving a public education and take appropriate steps to notify handicapped persons and their parents of the District's obligation in this regard. The regulation at 34 C.F.R. Section 104.33(a) and (b) requires the District to provide a free appropriate education to each qualified handicapped person who is in its jurisdiction. An appropriate education is defined as the provision of regular or special education and related aids and services designed to meet the individual educational needs of handicapped persons as adequately as nonhandicapped persons' needs are met. The regulation at 34 C.F.R. Section 104.35(a), (b) and (c) requires the District to conduct an evaluation of any person who because of a handicap needs or is believed to need special education or related services. The District must establish standards and procedures for evaluation and placement which ensure that tests have been validated and tailored to assess specific areas of educational need; that the tests

are administered by trained personnel; and that the test results reflect the student's aptitude or achievement level rather than reflecting the student's impaired sensory, manual, or speaking skills, A recipient must, in making placement decisions, draw upon information from a variety of sources and establish procedures to ensure that all information obtained is documented and carefully considered. Placement decisions are to be made by persons with knowledge of the student, the meaning of the evaluation, and placement options.

The complainants allege that the District does not identify, evaluate, or place handicapped students who are not eligible for services under the IDEA. The complainants provided the names of nine students as examples of those not identified, evaluated, or placed. OCR examined the files and interviewed the teachers, principals, and counselors of these students to determine if the students were properly identified, evaluated, and placed in accordance with Section 504 process requirements. We did not, however, review individual placement determinations.

The District's procedures provide for a comprehensive program to identify all of its handicapped students. Information regarding the District's program for handicapped children through the age of 21 is disseminated at least twice during the year by a publicity campaign consisting of such things as letters to parents of all students and news articles. The "child find" contact person's name, function, and how to contact him/her is a part of this publicity. Additionally, the District makes radio announcements containing the information. The local welfare, health department, headstart, and mental health

representatives are contacted to explain the referral process and request that personnel refer children 21 and under who may be handicapped. The agencies are contacted twice in writing and twice in person each year. In-school identification, among other things, includes a review of the student's instructional program when any two subjects are failed at the end of a semester, follow-up of the students whose statewide testing shows a significant discrepancy between expected and measured achievement, follow-up on students whose achievement data are not commensurate with classroom performances, etc.

When a child is having problems in school which are adversely affecting his educational performance, special services may be needed. Prior to requesting that the child be considered for possible placement in special education, the District considers whether modifications of the regular education program can be made. Options such as more instructional interventions within the structure of the regular program are considered. To ensure that the intervention is appropriate, cultural differences and/or physical problems are considered.

If the regular classroom teacher and other District personnel determine instructional interventions are not appropriate, a teacher narrative is prepared. The narrative and all other available information are forwarded to the Local Survey Committee (LSC). This constitutes a request for a child study. The child study process consists of receiving a request and collecting and reviewing information to decide whether to refer the child for a comprehensive assessment.

The comprehensive assessment consists of gathering data about a child to determine the child's present level of performance and the presence or absence of a handicapping condition. This assessment includes physical, language/speech, social/behavioral, emotional and educational testing. If the assessment team determines that evaluation data indicate a handicapping condition, a committee to develop an individual educational plan is appointed and the appropriate placement is determined.

OCR found that all nine students referenced by the complainants had been identified by the District. Of the nine students, four had been evaluated for special education, and three of the four were placed in special education programs. The fourth student was determined not to need special education or related aides and services at the time of the assessment. Four of the nine students had modifications in the regular classroom, and two of these students were progressing academically with the modifications; the other two students' academic progress has not been satisfactory and the District is in the process of further evaluation. There was a meeting of all the teachers and the parents of the ninth student and intervention methods were put in place; however, the student was hospitalized before these modifications were attempted.

During the on-site visit, the complainants alleged that the District totally disregards findings of private evaluations and does not consider outside recommendations. It was also alleged that special education students in the District are not allowed to participate in sports or cheerleading activities. The complainant further alleged that the Mississippi Department of Education (MDOE) does not allow

kindergarten students to be evaluated for special education or related services.

OCR interviewed District personnel in reference to the allegations made by the complainant during the on-site investigation. District personnel stated that, "private evaluations are considered for eligibility and also in determining the program designed for the child." Our review of the record confirms the District's position.

In reference to special education students not being allowed to participate in sports and cheerleading activities, OCR was informed that this is not accurate. The District contends that the only difference in special education and regular education students is that special education students are exempt from the "no-pass, no-play" rule. Our investigation confirms that special education students do participate in such extracurricular activities.

With respect to the evaluation of kindergarten students, OCR was assured by District personnel that MDOE has no rule prohibiting the evaluation of kindergarten students. Not only are they evaluated, but the District currently has kindergarten students receiving special education and/or related services.

OCR was informed by District personnel that the District identifies, evaluates, and provides an appropriate education to all handicapped students. The District is presently providing services to a number of students who are not covered under IDEA, *e.g.*, an aide to assist with use of the bathroom, note takers, tutorial services, homebound services for temporary disabilities, special classroom/teacher accommodations for non-special education students, etc.

Based on available evidence, the District does identify, evaluate, and provide an appropriate education to handicapped students who are not eligible under IDEA. OCR, therefore, determined that the District is not in violation of the regulation implementing Section 504 at 34 C.F.R. Sections 104.32(a), (b), 104.33(a), (b), 104.35(a), (b) and (c).

Procedural Safeguards

The regulation implementing Section 504 at 34 C.F.R. Section 104.36 requires the District to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

The District provided a description of procedural safeguards, due process, which indicated the District had procedural safeguards with respect to a free appropriate education for all handicapped students. In an interview with the Associate Superintendent, however, OCR was informed that due process hearings for students eligible under IDEA are the only hearings that are held. There is no procedure for Section 504 due process hearings and he did not think that the hearing officers provided by MDOE were trained in Section 504.

The complainants informed OCR that the District on at least three occasions has denied students a Section 504

hearing. In each instance, the parents of the students had requested due process under Section 504. The complainants provided a letter from the District dated June 1, 1990, which stated, "the District has complied with Section 504 regulation by following the procedural requirement of EHA." In a second letter from the District, also dated June 1, 1990, the Special Education Director stated, "EHA (P.L.94-142) supersedes Section 504" and "all requirements of Section 504 are contained in EHA (P.L. 94-142) and that EHA procedures meet the requirements of Section 504."

The above evidence shows that the District has not provided procedural safeguards in accordance with Section 504. The District, therefore, is in violation of the regulation implementing Section 504 at 34 C.F.R. Section 104.36.

In a letter dated February 8, 1991, the District provided the following assurance of actions that will be taken in order to correct the violation:

> The District will provide due process hearings to any parent where differences regarding handicapped students cannot be resolved by informal measures. The District will request that the Mississippi State Department of Education (MDOE) appoint hearing officers to hear all issues of a dispute of both Individuals with Disabilities Act (IDEA) and Section 504. In the event that MDOE will not appoint a hearing officer to hear all issues, the District will employ a person to do so.

Based upon your written assurance that the remedial actions have been implemented, we consider the District to be presently fulfilling its obligations under Section 504

with respect to procedural safeguards. Continued compliance is contingent upon carrying out the assurances. Failure to perform the agreed-upon corrective action may result in the finding of a violation. As is our standard practice, compliance with commitments and assurances will be monitored. Accordingly, we request that the District submit a first report by July 15, 1991, and a second report by June 1, 1992, providing the following information:

> Explain the District's Section 504 procedural safeguards, i.e., the procedures previously submitted if MDOE provides hearing officers, newly developed procedures if MDOE does not provide hearing officers. Identification of all requests for a due process hearing under Section 504, during the 1990-91 and the 1991-92 school year, whether the request was granted or denied, and if denied, provide the reason. Include a copy of the hearing officer's decision for each Section 504 due process hearing held during the 1990-91 school year.

This letter of findings is not intended to cover any other issues regarding compliance with Section 504 that may exist and are not discussed herein. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

In accordance with agency procedures, we remind you that intimidation or retaliation by recipients of Federal financial assistance is prohibited. No recipient or other

person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing held in connection with a complaint.

Thank you for your cooperation in this matter. If you have any questions, please contact Mr. Raul R. Gamez, Director, Elementary and Secondary Education Division, at (404) 331-7820.

Jesse L. High

Regional Civil Rights Director

20 IDELR 276

Pueblo (CO) Sch. Dist. #70 (Child Find)

Office for Civil Rights, Region VIII

May 13 1993

[ ] CHILD FIND

[ ] PRESCHOOL PROGRAMS

[ ] Evaluations, Scope of Evaluation Procedures

Summary

A complaint was filed with OCR alleging that a school district was in violation of the implementing regulations of Section 504 and Title II by failing to adequately locate every qualified person with a disability who was residing in its jurisdiction, and who was not receiving a public education. The complaint further alleged that the district also failed to notify the parents of the district's duty to annually undertake this location and identification process.

HELD: for the parents.

OCR's investigation revealed that the district's Child Find program, which was directed at qualified persons with disabilities age five years and under, provided adequate outreach efforts to children who were not receiving a public education. The district's undertakings in this regard included the posting of Child Find notices in a variety of areas, the broadcasting of Child Find public service announcements on the local television and radio stations, and the mailing of annual notices to parents of children already enrolled in the district's schools. OCR also determined, however, that the district's efforts to

locate qualified persons with disabilities between the ages of five and 21, within its jurisdiction who were not receiving a public education, were generally limited to reacting to inquiries from other agencies, rather than an active effort by the district to identify and locate these students. The district's efforts to notify qualified persons with disabilities and their parents of the district's obligations to provide such services, were also found to be inadequate.

Dr. Michael L. Johnson
Superintendent
Pueblo School District #70
24951 Highway 50 East
Pueblo, CO 81006

Complaint No. 08-93-1036

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the complaint filed against Pueblo School District #70 ("the District"). The complaint was investigated pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at Title 34, Code of Federal Regulations (C.F.R.), Part 104, which prohibit discrimination on the basis of disability in any program or activity receiving Federal financial assistance and Title II of the Americans With Disabilities Act of 1990 (Title II), 42 U.S.C. § 12134, which prohibits discrimination by public entities. The District is a recipient of Federal financial assistance from the U.S. Department of Education, and it is a public educational entity. It is therefore subject to the requirements of Section 504 and Title II.

OCR investigated the following issue:

> Whether the District undertakes to identify and locate every qualified disabled person residing in its jurisdiction who is not receiving a public education and takes appropriate steps to notify them and their parents or guardians of its duty under Subpart D. [34 C.F.R. § 104.32(a) and (b) and 28 C.F.R. § 35.130]

OCR's investigation included a review and analysis of records and documents pertinent to the issues in the complaint. OCR conducted interviews with the complainant and the District's Special Education Director. We have concluded that the District has violated Section 504 and its implementing regulation at 34 C.F.R. § 104.32(a) and (b) and Title II and its implementing regulation at 28 C.F.R. § 35.130. The factual and legal bases for our determination are set forth below.

Location and Identification

The regulation implementing Section 504 [34 C.F.R. § 104.32(a) and (b)] require the District to annually undertake to identify and locate every qualified person with a disability residing in the recipient's jurisdiction who is not receiving a public education.

The implementing regulation at 34 C.F.R. § 104.3(j) and (k)(2) defines a qualified person with a disability as any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. With respect to public preschool, elementary, secondary, or adult education services, a

qualified disabled person is of an age during which non-disabled persons are provided such services, or of any age during which it is mandatory under state law to provide such services to disabled persons, or to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act.

Since the State of Colorado does not require public education for students younger than age 5 and the District does not provide public education services for that age group, qualified disabled persons for the purpose of this investigation include persons ages 5 through 21.

The District has written procedures that commit to creating an overall awareness of the rights of individuals with disabilities to a free and appropriate public education. According to the District's written procedures, this information is to be disseminated via newspapers, radio, and television, and provided to members of the medical profession, realtors, and preschools.

"Child Find" is the name that the District uses for its location and identification activities directed at qualified persons with disabilities age 5 years and under. The District posts Child Find notices in a variety of locations in the Pueblo area, including school libraries, school sites, the city's hospital, school news letters, at Post Offices, at health and social service agencies, at a public health clinic, at local retail establishments, at trailer parks, and through religious organizations. Public service announcements regarding Child Find are broadcast on local radio and television stations. Also, parents of students ages 5 to

21 already enrolled in the District's schools and two affiliated day care centers receive annual notice.

With respect to the District's efforts to locate qualified persons with disabilities over the age of 5 years, who are not currently enrolled, the District will arrange for screenings upon request, for example, from administrators of private and parochial schools, juvenile detention centers, halfway houses, institutions, or nursing homes. School counselors are responsible for contacting drop-outs and their parents to determine whether the student has a disability that is interfering with his/her potential in school. The District makes no other specific outreach effort to this age group.

As part of its identification and location process, the District has written procedures for annually conducting screenings for children 5 years and under. The screenings involve the following assessments: health, vision, hearing, communication, psychological development, and educational functioning. In addition, District staff interview the parent for health, social, and developmental information and history about the child.

OCR examined the forms used by the District to record information obtained during its screenings. The forms solicit from the parent information regarding pre-natal history, physical development; behavior; significant health problems, illnesses, and complaints, including allergies to food or other substances; social functioning, language, *etc.* OCR found that the screening procedure is sufficiently detailed to prompt the parent to disclose information that may indicate whether the child has

impairments covered by Section 504 that may be disabling.

The written procedures provide that persons 5 to 21 years of age who are currently not receiving a public education, receive individualized screening. The District's Special Education Director reported that individualized screening of children ages 5 to 21 includes the "TARGET" and vision, hearing, emotional, vocational, education, and verbal assessments.

The District's Special Education Director reported that during the twelve-month reporting period, a total of 1043 individuals were screened; 112 of them were eventually placed in special education programs.

OCR found that the District has made adequate outreach efforts under its Child Find program to reach 5 year olds who are not currently receiving a public education. However, OCR found that the District's efforts to locate qualified persons with disabilities ages 5-21 within its jurisdiction who are *not* receiving a public education are generally limited to reacting to inquiries from other agencies rather than an active effort by the District to identify and locate these individuals.

Notification

The regulations implementing Section 504 [34 C.F.R. § 104.32(a) and (b)] require the District to annually take appropriate steps to notify persons with disabilities and their parents or guardians of the recipient's obligation to provide a free appropriate education to each qualified person with a disability in its jurisdiction.

Each year, the District advises parents of current students by letter of its obligation to provide a free appropriate public education for all students who reside in the District. The letter asks parents to tell the parents of children with disabilities who are not in school about its program, or to inform the District directly of these children.

The District also disseminates to parents of students currently enrolled, physicians' offices, realtors, and hospitals a pamphlet entitled "A special Way to Learn" that explains that the District provides a total program including individualized curriculum, specific remediation, and vocation and specialized activities designed to meet the needs of students who are having learning difficulties.

OCR found that the number of sources to whom this information is disseminated is limited compared to the number of recommended sources available to the District. Furthermore, we found that Child Find notices, that receive wider dissemination, do not clearly state the District's obligation to provide a free appropriate public education. Therefore, we found that the District's efforts to notify qualified persons with disabilities and their parents or guardians of the District's obligation to provide such services is inadequate.

Based on the evidence presented, OCR finds the District in violation of 34 C.F.R. § 104.32(a) and (b) and 28 C.F.R. § 35.130. To address OCR's findings, the District has submitted the enclosed corrective action agreement to correct the cited violations. We are closing this case effective the date of this letter.

This letter addresses only the issues discussed above and should not be interpreted as a determination of the District's compliance or noncompliance with Section 504 and Title II in any other respect. Individuals filing a complaint or participating in an investigation are protected by Federal law against harassment, retaliation, or intimidation [34 C.F.R. § 100.7(e)].

Continued compliance is contingent upon the District implementing the provisions of its corrective action agreement. Failure to perform the actions in question may result in a finding of noncompliance. Compliance with commitments and assurances will be monitored to ensure full implementation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information, which, if released, could constitute an unwarranted invasion of privacy.

We wish to thank you and your staff for the cooperation extended to our investigator throughout the course of the investigation. If you have any questions, you may call me at (303) 844-5695, or your designee may call Ms. Nancy L. Haberkorn, Director, Compliance Enforcement Division I, at (303) 844-2991.

Cathy H. Lewis

Regional Director

20 IDELR 864

Veir, Letter to (Section 504 Coverage)

Office for Civil Rights

Carole Veir, Ed.D.
TACHO President
Texas Association of Section 504
Coordinators & Hearing Officers
P.O. Box 1826
Wimbereley, TX 78676

Digest of Inquiry

[Date Not Provided]

May a medical statement from a student suspected of being disabled be required when the district is unable to identify a specific medical or physical impairment that substantially limits a major life activity?

Must a district provide special types of food when a student is determined to need dietary modifications at school?

Are districts responsible for providing services to private school students with disabilities? Must districts conduct child find activities at private schools?

Do students who are referred for special education eligibility but who do not meet IDEA criteria, automatically become eligible under Section 504?

Can a student who is identified as eligible under both the IDEA and Section 504 receive certain IDEA services while still being provided Section 504 services within the regular classroom, or should such a student receive all services for his/her disability pursuant to the IDEA?

Do districts have the right to take parents to due process hearings under Section 504?

If a student is identified as in need of modifications or services under Section 504, but the parent chooses to provide the student with home schooling, does the district continue to be responsible for providing services to the student within the home environment?

What is the difference between the terms "related aids and services" and "supplemental aids and services" under the Section 504 regulations? What is the difference between the phrases "regular or special education and related aids and services" and "special education or related services . . . in a regular or special education program" under the Section 504 regulations?

If a student with a disability, who is eligible under Section 504, is constantly disruptive on the school bus, may the district revoke the student's bus privileges, even if the student requires transportation to get to school?

Must a student with a record of an impairment, who was protected by Section 504 at one time but is no longer in need of special accommodations or services, be disciplined in the same manner as a student with a disability which is currently receiving accommodations or services under Section 504?

Digest of Response

December 1, 1993

Medical Assessment Required Only if District Suspects a Disability

A district may not require a parent or a student to provide a medical statement if the district suspects that the student has a disability that would result in Section 504 eligibility. In such a circumstance, the district is obligated to conduct an evaluation of the student, including a medical assessment, if necessary, at no cost to the parents. On the other hand, if the district does not believe that the student has a disability that would result in Section 504 eligibility, then the district is not required to conduct an evaluation of the student; however, the district must inform the parents of their due process rights to challenge the decision not to evaluate.

Special Foods May be Required for Students with Disabilities

Unlike medication, which a district is not responsible for providing to any student, if the district provides food services to students generally, then it would also be required to provide appropriate food services to a student with a disability who has special dietary needs, on the same basis that food services are provided to students without disabilities. Thus, as determined on a case-by-case basis, the district may be required to provide special foods to meet the individual needs of a student with a disability.

Parentally-Placed Students Lack Entitlement to Services

If a district has made FAPE available to a student with disabilities, and the parent or guardian nevertheless places the student at a private school, then the district is not required to provide services to the student at the private school. Furthermore, while districts are required to take steps annually to identify and locate students with disabilities who are not receiving public educations, the Section 504 regulations do not specify the manner in which a district may undertake this child find responsibility. Accordingly, steps other than conducting child find activities at private school locations may be sufficient, such as disseminating notices to private schools and state and local agencies and placing notices in newspapers.

IDEA Ineligibility Does Not Automatically Result in Section 504 Eligibility

Depending on the severity of their disabling conditions, students who do not meet IDEA eligibility criteria may or may not fit within the definition of Section 504 eligibility. Section 504 eligibility is not automatically bestowed on a student who is referred for a special education evaluation and who is subsequently determined not to be IDEA-eligible.

Section 504 Requirements Met by Compliance with IDEA

OCR cannot conceive of any situation in which children identified as IDEA-eligible are not also

entitled to Section 504 protection. However, pursuant to the Section 504 regulations, the implementation of an IEP in accordance with the IDEA is one means of meeting the Section 504 requirements for a student with a disability, assuming that the student is being served for the same disability under both the IDEA and Section 504.

Districts May Take Parents to Section 504 Hearings

Districts may take parents to due process hearings under Section 504, and in some circumstances, are required to do so. For example, if a child is receiving Section 504 services and the parents subsequently withdraw their consent to the provision of these services, then the district may not simply accede to the parents' wishes, but rather, must take the parents to a hearing under Section 504, if the district continues to believe that the services are necessary.

Home-Schooled Students Not Entitled to Section 504 Services

If a district has offered FAPE to a student who has been identified under Section 504, but the parent decides not to enroll the student in a public education program (such as a parental decision to provide the student with home schooling), then the district is not responsible under Section 504 for the provision of educational services to the student.

Certain Section 504 Terms and Definitions are Interchangeable

The meaning of the terms "related aids and services" and "supplemental aids and services"

under the Section 504 regulations at 34 CFR 104.33(b) and 104.34(a), respectively, are identical and, therefore, interchangeable. The phrases "regular or special education and related aids and services" and "special education or related services . . . in a regular or special education program" under the Section 504 regulations at 34 CFR 104.33(b) and 104.35(a), respectively, also have identical meanings.

Transportation Services May Not be Unilaterally Terminated

If transportation is deemed to be a related service for a student with a disability, then the district may not revoke transportation services, even when the student has exhibited disruptive or dangerous behavior during transit to and from school, without taking steps to conform to all of the Section 504 requirements that are applicable to disciplinary sanctions. A district may, however, seek to change the mode or method of providing transportation services if a student with a disability poses a danger to himself or others.

Section 504 Protection Not Limited to Students with Current Need for Services

A student with a disability who does not currently require special accommodations or services, is still entitled to Section 504 protection and must be disciplined in the same manner as a student with a disability who is currently receiving special accommodations or services.

I am pleased to respond to your letter to Assistant Secretary for Civil Rights, Norma V. Cantu, on behalf of the

Texas Association of Section 504 Coordinators and Hearing Officers. In your letter, you ask 10 questions. I will restate each question, and follow each with a response.

1. **Can a district require a medical statement for students for whom they cannot pinpoint a medical or physical impairment that is substantially limiting a major life activity within the schools and for which assistance is needed in the school? If the incident was many years ago, must the district have a medical record or statement prior to ruling on eligibility?**

A district cannot require a parent or student to provide a medical statement *if* the district suspects that the student has a disability that would necessitate the provision of regular or special education and related aids and services under the regulations implementing Section 504 of the Rehabilitation Act of 1973 (Section 504). However, a school district is not required to evaluate a student who the school district does not believe has a disability, *e.g.* a mental or physical impairment which substantially limits a major life activity, such as learning. A district is required to conduct an evaluation of any person who, because of disability, needs, or whom the district believes to need, regular or special education and related aids and services before placing the person in a regular or special education program with related services. 34 C.F.R. § 104.35(a). If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 C.F.R. § 104.35(a) and (b), the district must ensure that the child receives this assessment at no cost to the parents. If alternative assessment

methods meet the evaluation criteria, these methods may be used in lieu of a medical assessment. If a district does not believe that a student has a disability and refuses to evaluate the child, the district must inform the parents of their due process rights under 34 C.F.R. § 104.36.

Please note that we did to respond to the second question regarding a medical record because we did not understand the context, *e.g.*, What does "if the incident was many years ago" mean?

2. Are districts required to provide the food when dietary modifications are needed? Or do parents provide the food and the school prepare it (like with medication)?

It depends. A recipient, in providing any aid, benefit, or service, may not deny or afford a person with a disability an opportunity to participate in, or benefit from, an aid, benefit, or service, such as the provision of food services, that is not equal to, or as effective as, that provided to persons without disability. The recipient also is required to provide free appropriate public education to each qualified person with a disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met. 34 C.F.R. § 104.33(a) and (b). Unlike medicine, which the school is not required to provide for any student, if the school provides food to students generally, it would also have to provide an appropriate lunch to the student with disabilities who has special dietary

needs on the same basis that food is provided to students without disabilities. Depending on the circumstances, the school may have to provide special foods to meet the individual needs of the student with disabilities. This responsibility is determined on a case-by-case basis.

3. **Are the public schools that have responsibilities under Section 504 also responsible for providing services to students in private schools? Must a child find be conducted in the private schools by the public entity? Must the public schools provide evaluations for private school children who are suspected of having a substantial limitation in one or more life activities if the parents request one? If the public school must serve these children, must the public school provide the transportation? Can these services be after school, or must they be held during the school hours? Is there a potential for a conflict such as that in *Aquilar v. Felton and Chapter 1 issues*?**

If a recipient has made available a free appropriate public education to a person with a disability and the person's parent or guardian chooses to place the person in a private school, Section 504 does not require the recipient to provide services in the private school. 34 C.F.R. § 104.33(c)(4). Please note I have not answered your other questions because they were premised on the notion that under Section 504, public schools must serve persons with disabilities placed in a private school by a parent.

The Section 504 regulation at 34 C.F.R. § 104.32 does require public schools to take steps annually to identify and locate children with disabilities who are not receiving a public education and to publicize to children with

disabilities and their parents the rights and duties established by Section 504 and the regulation implementing Section 504. The regulation does not specify the manner in which a district must meet its location and notification responsibility. There are many means available including notices to private schools, state and local agencies, and notices placed in newspapers.

4. **For students who are referred to Special Education but do not qualify under IDEA criteria, do they automatically become Section 504 students? (Board policies of most districts state that the students automatically become Section 504 if they do not qualify for IDEA services.)**

Under Section 504, a "person with disabilities" is defined as any person who has a physical or mental impairment which substantially limits a major life activity. Thus, depending on the severity of their condition, students who do not meet the standards under Part B of the Individuals with Disabilities Education Act (IDEA) may or may not fit within the Section 504 definition. It is not automatic.

5. **Can a student be identified as IDEA eligible and be receiving some services under IDEA, and also be identified as a Section 504 student and be receiving different assistance in the regular classroom under Section 504? If the child is eligible for IDEA for the disability, shouldn't they receive all services for their disability under IDEA?**

For purposes of this response, we assumed that the student described in the question is being served for the

same disability under IDEA and Section 504. In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. The office for Civil Rights cannot conceive of any situation in which these children would not also be entitled to the protection extended by Section 504. A student identified as IDEA eligible and receiving services under the IDEA in order to receive a free appropriate public education could receive the same assistance in order to comply with Section 504. Section 104.33(b)(2) states that implementation of an individualized education program developed in accordance with IDEA is one means of meeting Section 504's requirement for the provision of regular and special education and related aids and Services designated to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met.

6. It is clear that a parent can take the school district to a hearing regarding their section 504 student. Can a district take a parent to hearing as well?

Yes. For instance, if a child is receiving services the school district thinks are necessary for the provision of a free appropriate public education under Section 504, and the parent decides he/she no longer wants the child to receive the services, the district cannot simply accede to the parent's wishes. It *must* use the Section 504 due process hearing requirements or other proceedings if the school district believes the child needs the services.

7. If a child is identified as in need of modifications/ services under Section 504, and the parent decides to home-school the child, is the district still responsible for providing services in the home for this child because they are in the jurisdictional area of the school's responsibility?

No. Where a district has offered an appropriate education, a district is not responsible, under Section 504, for the provision of educational services to students not enrolled in the public education program based on the personal choice of the parent or guardian. 34 C.F.R. § 104.33(o)(4).

8. Section 104.33(b) speaks to "related aids and services." What is the difference between this and 104.34(a) "supplemental aid and services?" Section 104.33(b) speaks to "regular or special education and related aids and services," whereas 104.35 speaks to "special education or related services . . . in a regular or special education program." Please provide clarification as to the meaning of these phrases and how they are to be interpreted.

Under Section 504, the meaning of the terms "related aids and services" and "supplemental aids and services" is identical, and the terms are interchangeable. The phrases "regular or special education and related aids and services" in section 104.35(a) and "special education or related services . . . in a regular or special education program" also have identical meanings.

9. If a Section 504 child is, due to his handicapping condition, constantly disruptive on the school bus, can the district have the child's bus privileges removed if s/he needs the transportation to get to school? If so, must the district still provide transportation? How about when the child is a threat to the safety of other children on the bus?

If transportation is a related service for a child with disabilities, any incident of misconduct on the bus should be viewed in the same manner as any disciplinary incident in the school. A district cannot revoke transportation services just as a district could not suspend a student with disabilities in excess of 10 days or, in some cases, impose cumulative suspensions exceeding 10 days without taking a number of prior actions. A district can change the mode or method of providing transportation services if a student with disabilities is endangering himself or others, just as a district can place a child with disabilities in a more restrictive setting if the child becomes dangerous.

10. Must a child who has a record of impairment, who was protected by Section 503 at one time but is no longer in need of any special accommodations, be disciplined in the same manner as a child who is currently receiving accommodations due to a current impairment? In other words, both students are Section 504, one is current and the other has a record of an impairment although not currently receiving services, but is the student who is not currently receiving Section 504 services and protection still entitled to the manifestation determination prior to disciplinary action?

Your question was somewhat confusing because we could not determine whether you were concerned about a

person who no longer has a disability or who no longer requires services. A child with a disability who *does not* require services is still entitled to the protections afforded by Section 504.

I hope this information has been helpful. If you have any questions, please call Ms. Gale Barron Black at (202) 205-8524.

Jean P. Peelan

Director

Elementary and Secondary Education

Policy Division

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Supreme Court, U.S.
FILED
JUN 26 1998
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No. 97-1830

In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY and DR. RICHARD BENJAMIN, in his official capacity,

Petitioners,

v.

MICHAEL DOE, by and through his parents and next friends, DR. AND MRS. BILL DOE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. In a case brought by the parents of a child with a disability for reimbursement of the costs of a residential educational placement, may the school district, by raising the defense that the parents failed to timely notify the district of their child's educational needs, convert the parents' suit for reimbursement into a facial challenge to the district's approved plan that implicates the spending clause?

2. Do due process hearing officers have jurisdiction to hear " . . . complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child,", 20 U.S.C. § 1415(b)(1)(E)?

3. Are there disputed issues of material fact as to whether or not the Metropolitan Nashville Public Schools met its duty to identify, locate and evaluate all children, 20 U.S.C. § 1412(2)(C), and specifically Michael Doe, who are in need of special education?

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STATEMENT OF THE CASE

A. Statutory context

Congress enacted the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"), in response to public school districts' exclusion of children with disabilities and their failure to detect the disabilities of children living within the district. Congress was attempting to redress its finding, *inter alia*, that "one million of the handicapped children in the United States are excluded entirely from the public system and will not go through the education process with their peers." 20 U.S.C. §1400(b)(4)[1] Toward this end, the statute imposes an affirmative obligation on school districts that accept federal funds earmarked for children with disabilities to identify, locate and evaluate eligible children within their jurisdiction. When a school district accepts funds pursuant to §1411(d) of the IDEA, it agrees to use those funds to

> provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education

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[1] The IDEA has since been reauthorized and amended, effective June 4, 1997. The cited language was in effect at the time of the initiation of the administrative complaint in this matter. Its substantial equivalent is new 20 U.S.C. §1400(b)(4), effective July 1, 1998.

> and related services and which children are not currently receiving such education and services.

20 U.S.C. §1414(a)(1)(A). In order to receive payments under §1411(d), each school district must "provide assurances" to the state educational agency that it "will establish or revise, whichever is appropriate, an individualized educational plan for each child with a disability." 20 U.S.C. §1414(a)(5). Based on such assurances, each state, in return for federal IDEA funds, provides the Secretary of Education with a plan

> set[ting] forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that . . . all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

20 U.S.C. §1412(2)(C).

These provisions of the IDEA, coupled with federal administrative approval of each state's plan, give school districts clear notice of the duties they incur in exchange for federal funds. In this way IDEA differs fundamentally from, for instance, Title IX, the passive language of which provides public school students with only negative rights against sex discrimination. See 20 U.S.C. §1681(a). Whereas Congress in Title IX stopped short of holding

school districts liable in monetary damages for undetected sex discrimination in an implied private action, (*see, Gebser v. Lago Vista Independent School District*, No. 96-1866, June 22, 1998, ___ U.S. ___ (1998)), in the IDEA Congress included affirmative provisions requiring school districts to seek out children with disabilities previously excluded by the school system and to evaluate their unmet educational needs. It is these "child find" provisions that the Does asserted as a response to the school system's claim that the Does had not asked for services.

B. Factual background

In 1992, the parents of Michael Doe elected to place him in a private residential educational placement. They had tried a number of private schools already for their then twelve year old son, but none had been able to cope with the serious aggressive behavior that is part of Michael's serious emotional disturbance. Up to and including that time, Michael's parents were unaware that the residential educational services Michael needed were available through their public school system.

In October of 1993, once Michael had been attending the residential educational placement for a full year, his parents learned that their public school district might be obliged to meet the specific needs of their child. The Does gave the school system copies of psychological evaluations and requested a multi-disciplinary team meeting to propose an individual educational plan for Michael to address his educational needs. Despite several meetings the school system did not respond for six months. In the

interim Michael remained in the residential placement at a total cost of $87,155. The school district refused to reimburse the Does for any costs of Michael's residential placement, even for the costs incurred while the multidisciplinary team's review was pending.

C. Decisions Below

At a due process hearing before a Tennessee administrative law judge, the Does sought reimbursement for Michael's residential placement. Their complaint was that the school district had failed to provide free appropriate public education by reason of not providing a residential placement, which flowed from the district's failure to properly conduct its child find activities. The school district had never informed the Does of their rights under IDEA. The district's failure to apprise the Does of their rights is even more egregious because, before his residential placement, Michael attended a private school where the district contracted for services with other children. Although Metro knew there were students there with disabilities not under contract, it never took any steps to have those children, including Michael, evaluated. The facial validity of the district's child find plan was not at issue in the administrative hearing nor at any subsequent level. The only issue is Metro's failure to comply with the requirements for child find which it had previously assured the state education agency it would follow.

On September 25, 1995, the administrative law judge ruled that the district's child find activities were inadequate under the statute. Nonetheless she held that the

Does knowledge that some services were available immunized the district from any liability.

On July 1, 1996, the District Court granted Metro's motion for summary judgment, affirming the decision of the ALJ. It held that the Does' knowledge of the availability of some special education services disposed of their case. The district court never held that there were no disputed issues of material fact. As the record shows, there is substantial dispute over the magnitude of the district's failure, in Michael Doe's case, to follow the procedures required by IDEA for locating, identifying and evaluating children with disabilities.

On January 5, 1998, the Sixth Circuit Court of Appeals reversed. Writing for a unanimous panel, Judge Boggs noted the impropriety of summary judgment in the face of disputed issues of material fact. Moreover, the court underscored that school districts must comply with their duties under IDEA notwithstanding the parents knowledge that some services existed for children with disabilities. "Even though the Does had some general knowledge of the availability of services, the failure by Metro to apprise the Does of their specific procedural and substantive rights could make reimbursement a proper remedy." *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 387 (6th Cir. 1998). Additionally, the court held that the Does may be entitled to reimbursement for the costs accumulated while the district's evaluation of their son was pending. Even if the district lacked notice of Michael's placement, it may still be liable for costs incurred during its own delay.

REASONS FOR DENYING THE WRIT

This Court should deny review. A request for a due process hearing seeking reimbursement for the costs of a residential educational placement is not an attack upon a district's child find plan. There is no uncertainty in the IDEA grant program such that the Spending Clause's requirements of certainty or notice to districts are implicated. Nor has this issue been raised at any stage of these lengthy proceedings before now. The Petition further misstates and distorts the findings below. There was no collateral attack upon the Petitioner's child find plan. Rather, there was a claim by the Respondents, as a response to Petitioner's defense of lack of notification, that Petitioner did not properly meet its duty under 20 U.S.C. §§1412(2)(C) and 1414(a)(1)(A) to locate, identify, and evaluate Michael Doe. This procedural failure to comply with an affirmative duty by Metro is properly raised in a hearing on a complaint with regard to a matter "relating to the identification, evaluation, or educational placement of the child" and as such is properly within the jurisdiction of the administrative law judge under 20 U.S.C. §1415(b)(1)(E). Finally, there were disputed issues of material fact as to the extent of the Does knowledge of the availability of services and the extent of Metro's procedural failures. For the reasons stated below the Sixth Circuit's decision does not create a violation of the Spending Clause, does not inappropriately expand the jurisdiction of due process hearing officers and did correctly apply the summary judgment standard.

ARGUMENT

I.

THERE IS NO AMBIGUITY IN THE GRANT SUCH AS TO CREATE INCONSISTENCY WITH THE REQUIREMENTS OF THE SPENDING CLAUSE, AND THIS ISSUE IS NOT TIMELY RAISED

The first issue raised by Petitioners revolves around whether or not parents of a child with disabilities who seek reimbursement for the costs of residential placement may, by reason of their claim be deemed to have collaterally attacked the adequacy of a child find plan and whether or not such a collateral attack, if allowed, is inconsistent with the Spending Clause.

These issues are raised here for the first time. They were not raised below at either the state administrative hearing level, the District Court level or the Court of Appeals level. They are new issues. As such they may not be raised here for the first time. Such issues must be brought before the lower courts and appear on the record, otherwise they are not open for this Court's consideration. *Tyrell v. District of Columbia*, 243 U.S. 1, 6 (1916) citing *Furness, Withy & Co. v. Yang-Tze Insurance Association*, 242 U.S. 430, 431 (1916). The issues must have been raised and briefed in the lower courts. *California v. Taylor*, 353 U.S. 553, 557, n. 2 (1957); *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958). Where an issue is not advanced in the courts below and was not argued to the Court of Appeals as a ground for reversing the trial court it should not be considered for the first time by this Court. *DeShaney v. Winnebago County Social Services Dept.*, 489 U.S. 189, 195, n. 2 (1989); *Youngberg v. Romeo*, 457 U.S.

307, 316, n. 19 (1982); and *Duignan v. United States*, 274 U.S. 195, 200 (1927). For this reason this Court should not hear these issues.

Even were the issues raised below, they are without merit. "States are required to identify, locate, and evaluate 'all children residing in the State who are disabled. . . . ' ". *Wise v. Ohio Department of Education*, 80 F.3d 177, 181 (6th Cir. 1996). The existence of an approved plan for funding does not mean the requirements of the law are met. If it did, no parent could ever challenge any aspect of the adequacy of their child's special education because all local education agencies (LEAs) have approved plans for funding that cover all aspects of the law. Further there is an "affirmative duty" to assure that all children who are disabled are identified, located and evaluated. *Robertson County School System v. King*, No. 95-5526, 6th. Cir. 1996.[2]

The implementing regulations of IDEA, at 34 C.F.R. §300.220, in a note, state that the LEA "is responsible for ensuring that all children with disabilities within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction." Further, the Administrative Policies and Procedures Manual of the Tennessee Department of Education states at page 118 that the LEA is responsible for the identification, location and evaluation of eligible children or children suspected of being

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[2] This unreported case from the Sixth Circuit is cited here because the District Court decision it reversed was relied upon by the Administrative Law Judge and the District Court Judge below in this case.

eligible for special education whose parents reside within the school system but who are enrolled in schools located outside the system. For a program of education to be considered appropriate it must "meet the State's educational standards" and comply with the "procedures set forth in the act." *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 203 and 206 (1982). Here neither was done. Congress did not pass a simple funding statute, but conferred on students with disabilities an enforceable substantive right. *Honig v. Doe*, 484 U.S. 305, 310 (1988).

It is abundantly clear then that there was no uncertainty whatsoever about the terms of the IDEA grant to Petitioner Metro. Metro merely failed to identify and evaluate a child whose location, along with others, it already knew about, as it admitted.[3] The court of appeals recognized the obvious: the district's statutory duty is not satisfied by paper promises. What the ALJ and the Sixth Circuit found inadequate was the district's execution of its "child find" duties with regard to Michael Doe.

II.

THE ADMINISTRATIVE LAW JUDGE ACTED WITHIN HER JURISDICTION

The Administrative Law Judge made no finding about the contents of the child find portion of Metro's approved plan. To say otherwise distorts and misstates the record.

What the ALJ did was to find that Metro's child find activities "as related to locating students suspected of

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[3] Joint Appendix Vol. VI, p. 2151, being page 170 of the transcript of the administrative hearing of June 5, 1995.

being eligible for services in a private school which is specifically geared for learning disabled students is found to be inadequate . . . "[4]

The ALJ was presented with a request for reimbursement of the costs of a residential educational placement. As a part of the response to that request the Petitioner Metro raised a defense asserting that Michael was not enrolled in Metro and the parents had not asked Metro to pay for the residential placement prior to enrolling him in the residential placement. In response to this asserted defense the parents asserted that Metro had failed in its procedural duty of locating, identifying and evaluating their child. This duty is commonly referred to as "child find" but is a broader duty than just child find because it includes the duty to evaluate and prepare a program for a child once found.

A parent may request an impartial due process hearing "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(1)(E).[5] As the Ninth Circuit has noted, hearings may be requested " 'respect[ing] any matter relating to the identification . . . of the child.' " *Hacienda La Puente Unified School District v. Honig,*

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[4] Final Order, Tennessee Department of Education, Case No. 94-71, pp. 9 and 12, Joint Appendix, Vol. II, pp. 1148-1149 and 1152.

[5] Pursuant to 20 U.S.C. §1415(b)(2) the State educational agency may have a one or two tiered hearing process. Tennessee has chosen to have a single hearing conducted by a state administrative law judge appointed by the Tennessee Department of Education.

976 F.2d 487, 492 (9th Cir. 1992), citing 20 U.S.C. §1415(b)(1)(E) and the implementing regulation 34 C.F.R. §300.506(a). Likewise, under Tennessee law a child's parent may have a hearing regarding "an action or omission by state or local authorities on the ground that the child has been or is about to be: (1) Denied entry or continuance in a program of special education appropriate to the child's condition and needs;" T.C.A. §49-10-601(a) and (a)(1). Likewise the Tennessee Department of Education's Administrative Policies and Procedures Manual provides that a hearing may be requested on the grounds that a child has been or is about to be "denied identification, evaluation, entry or continuance in a program of special education appropriate to his condition and needs." *Policies and Procedures Manual* at p. 103.

Clearly, the ALJ may hear proof and make findings relative to whether or not the school system has failed to provide free appropriate public education by reason of its failure to identify, locate and evaluate an eligible child. As this Court has noted, the administrative complaint and resulting civil action may concern, " 'any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.' " *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley*, 458 U.S. 176, 204-205 (1982).

The Administrative Law Judge acted within her jurisdiction.

III.

THERE ARE DISPUTED ISSUES OF MATERIAL FACT AS TO WHETHER OR NOT METRO MET ITS DUTY TO IDENTIFY, LOCATE AND EVALUATE MICHAEL DOE

Metro does not contest that there is a dispute about whether or not their failure to conduct sufficient child find activities resulted in a procedural violation serious enough to justify reimbursement for the residential placement. As a preliminary matter the Court of Appeals held that the due weight standard "does not mean that the district court can simply adopt the state administrative findings without an independent re-examination of the evidence." *Doe v. Metropolitan Nashville Public Schools*, et al., 133 F.3d 384, 387 (6th Cir. 1998). It then went on to note that there was a dispute about the degree of the Respondents' knowledge and the degree of the Petitioner Metro's procedural failures. *Ibid* at 388.[6] As the Court of Appeals noted the District Court must re-examine the evidence, per *Rowley*, to determine if any material facts are in dispute. If they are then the district court may not then weigh the evidence at the summary judgment stage. *Doe*, supra, 133 F.3d 384, 387, citing *Anderson v. Liberty Lobby*, 477 U.S. 232, 249 (1986). The Court of Appeals

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[6] Metro has not appealed that portion of the Sixth Circuit's decision holding that the District Court should have reviewed the ALJ's determination that reimbursement was not appropriate for that period of time after the pendency of their request for services, since Metro was then on notice and their failure to ask defense would not apply. 133 F.3d at 388.

correctly found that there were material facts in dispute under the *Anderson v. Liberty Lobby* standard.

CONCLUSION

For the reasons set forth above the Petition should be denied.

Respectfully submitted,

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